# (25,779)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1916.**

# No. 949.

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THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

*vs.*

COLLINS PRODUCE COMPANY.

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**IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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a Office Supreme Court U. S. Filed Feb. 19, 1917. James D. Maher, Clerk.

Original.

TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1913.

No. 2155.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

Mr. H. T. Dick, Mr. L. O. Whitnel, Counsel for Plaintiff in Error.
Mr. G. Gale Gilbert, Counsel for Defendant in Error.

Error to the District Court of the United States for the Eastern District of Illinois.

Transcript of record filed Aug 12, 1914. Printed record filed Aug. 27, 1914. Edward M. Holloway, Clerk.

1 *Placita.*

Pleas in the District Court of the United States for the Eastern District of Illinois, at a Regular Term thereof, Begun and Held at the United States Court-house, in the City of East St. Louis, in said District, on the First Monday (Being the 4th Day) of May, in the Year of our Lord One Thousand Nine Hundred and Fourteen, and of Our Independence the One Hundred and Thirty-eighth Year.

Present: Honorable Francis M. Wright, Judge of said Court.

The following among other proceedings were had and entered of record, to-wit:

2 No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Assumpsit.

Be it remembered that heretofore, to-wit: on the 13th day of February, A. D. 1914, there was filed in the office of the Clerk of the District Court of the United States for the Eastern District of Illinois, a transcript of record from the Circuit Court of Jefferson County, Illinois, which said transcript is in the words and figures following, to-wit:

*Præcipe for Summons.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

In the Circuit Court, January Term, A. D. 1914.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Assumpsit.

Demand, $5,000.00.

To Burrell Hawkins, Clerk:

You will please issue a summons in the above styled cause and deliver the same to the sheriff of said county of Jefferson in the state of Illinois, to serve, making the summons returnable to the next January term of the said Circuit Court.

G. GALE GILBERT,
*Attorney for Plaintiff.*

Endorsed: "Filed Dec. 8, 1913, Burrell Hawkins, Clerk Circuit Court, Jefferson County."

*Summons.*

JEFFERSON COUNTY,
*State of Illinois, ss:*

The People of the State of Illinois to the Sheriff of said County, Greeting:

We Command You to Summon Chicago and Eastern Illinois Railroad Company if it shall be found in your County, personally to be,

and appear before the Circuit Court of said Jefferson County, on the first day of the next term thereof, to be holden at the Court
3 House in Mt. Vernon, in said Jefferson County, on the 12th day of January, A. D. 1914, to answer unto Collins Produce Company in a plea of Assumpsit to the damage of said plaintiff as it says in the sum of ($5,000.00) Five Thousand Dollars.

And Have You Then And There This Writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, Burrell Hawkins, Clerk of our said Circuit Court, and the seal thereof at Mt. Vernon, this 8th day of December, A. D. 1913.

[SEAL.] BURRELL HAWKINS, *Clerk,*
By CLARENCE SHOOP,
*Deputy Clerk.*

*Sheriff's Return.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

I have made diligent efforts to find an officer or agent of the defendant Chicago and Eastern Illinois Railway Company in the said county in order to effect personal service upon such officer or agent by copy as provided by law, but there is no officer or agent of the defendant in this county, and I hereby return this summons not served and make return that no officer or agent of the defendant, Chicago and Eastern Illinois Railroad Company can be found in my County and that no officer or agent of the defendant is found in my county, as I am therein commanded. W. S. PAYNE,
*Sheriff Jefferson County, Illinois.*

Endorsed: Circuit Court Summons, In the matter of Collins Produce Company vs. Chicago and Eastern Illinois, Railroad Company. Summons returnable to January Term, 1914. Sheriff's Fees, Return 10c. Filed in the Circuit Court this 8th day of December, 1913. Burrell Hawkins, Clerk, G. Gale Gilbert, Attorney."

4 *Affidavit for Service, etc.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

In the Circuit Court, January Term, A. D. 1914.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Assumpsit.

Demand, $5,000.00.

G. Gale Gilbert being first duly sworn on his oath states that he is the attorney for the Collins Produce Company, the plaintiff in the

above styled cause, and that he makes this affidavit for and on behalf of the said plaintiff.

This affiant further states that the Chicago and Eastern Illinois Railroad Company is an incorporated railroad company, and that the said Chicago and Eastern Illinois Railroad Company was incorporated under the laws of the State of Illinois more than one year ago, and since said time has existed and now exists as such corporation under and by virtue of the laws of the state of Illinois, and that the principal place of business and the principal office of the said Chicago and Eastern Illinois Railroad Company is in the McCormick Building in the county of Cook in the State of Illinois, and that the present address of the said Chicago and Eastern Illinois Railroad Company is McCormick Building, Chicago, Illinois; that William J. Jackson is the president of said defendant corporation and that his address is McCormick Building, Chicago, Illinois.

This affiant further states that continuously for more than one year last past the line of railroad of the Chicago and Eastern Illinois Railroad Company, defendant, has extended into and through the said county of Jefferson in said State, and now extends into and through the said county.

This affiant states that there is no officer, employee, servant or agent of the said Chicago and Eastern Illinois Railroad Company in or within the said county of Jefferson; and that there is no officer or agent of the defendant Chicago and Eastern Illinois Railroad Company in said county to whom a copy of process can be delivered for the purpose of effecting service of summons upon the said defendant and that upon diligent inquiry no officer or agent of the defendant Company can be found in the said county.

5 Therefore on behalf of the plaintiff, this affiant prays that the defendant Chicago and Eastern Illinois Railroad Company, may be served with process by the publication of notice of this suit as is provided by law in such cases and that copies of such notice so published may be mailed by the Clerk of this court to the defendant, and also to the president of the defendant, in accordance with the statute in such case made and provided.

G. GALE GILBERT.

Subscribed and sworn to before me this 8th day of December, A. D. 1913.

[CIR. CT. SEAL.] BURRELL HAWKINS, *Clerk.*

Endorsed: Collins Produce Company vs. Chicago and Eastern Illinois Railroad Company. Affidavit for service by publication. Filed Dec. 8, 1913. Burrell Hawkins, Clerk of the Circuit Court, Jefferson County. G. Gale Gilbert, Att'y for Plaintiff."

*Certificate, etc.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

In Circuit Court, January Term, A. D. 1914.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Assumpsit.

Demand, $5,000.00.

The Collins Produce Company, a corporation plaintiff, by G. Gale Gilbert, its attorney, complains of the Chicago and Eastern Illinois Railroad Company, defendant, of a plea of trespass on the case on promises: For that whereas the Chicago and Eastern Illinois Railroad Company, at the times hereinafter mentioned was and now is a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and before and at the time of the making of the promises hereinafter mentioned, was a common carrier of goods and chattels for hire, its line of railroad then and now extends in and through the county of Jefferson and State of
6 Illinois, and as such common carrier the said Chicago and Eastern Illinois Railroad Company was at such times amenable to the laws of the United States relating to Interstate Commerce then in force and as such common carrier operating under and bound by the provisions of an act of the Congress of the United States, Entitled, "An Act to amend an act entitled, 'An Act to regulate commerce,' approved February fourth, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," in force June 29th, 1906; and when receiving property for transportation from a point in one state to a point in another state, was and is bound by the provisions of Section twenty thereof, as amended, and which set forth is as follows; "That any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any carrier, railroad or transportation company, to which such property may pass; and no contract, receipt, rule or regulation shall exempt such carrier, railroad or transportation company, from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad or transportation company,

issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof," and the Chicago and Eastern Illinois Railroad Company being such common carrier by railroad aforesaid, the plaintiff on the 21st day of March, 1913, at Cypress in the County of Johnson in the state of Illinois, in consideration that the plaintiff had then and there caused to be delivered to the said Chicago and Eastern Illinois Railroad Company at its request certain goods and chattels of the plaintiff, to-wit: Fowls, Cocks, Chickens, ducks, geese and turkeys of the value of Five Thousand Dollars, to be taken care of and safely carried by said railroad company from Cypress on said Chicago and Eastern Illinois Railroad, in the
7 county of Johnson in the state of Illinois, to Newark in the state of New Jersey, and at the last named place to be safely delivered to C. E. Barker and Company, for the plaintiff; that said railroad company then and there issued a receipt or bill of lading for the said poultry and chattels so received as aforesaid for the transportation thereof as aforesaid to the place aforesaid; and in consideration thereof and in consideration of certain reward to the said railroad company in that behalf then and there paid by the plaintiff, the said Chicago and Eastern Illinois Railroad Company, on the day aforesaid in the county and state aforesaid, promised the plaintiff to take care of the said poultry and chattels and safely carry the same by railroad to Newark in the state of New Jersey, and at the last named place to safely deliver the same to the said C. E. Barker and Company; and although the said railroad company, as such common carrier aforesaid, then received the said goods, chattels and poultry, at the first place aforesaid, for the purpose aforesaid, and although a reasonable time for the carriage and delivery thereof as aforesaid has since elapsed, yet the defendant did not nor would though often requested, safely carry the last mentioned goods, chattels, or poultry from Cypress in the state of Illinois, aforesaid to Newark in the state of New Jersey aforesaid, or at the last named place deliver the same for the plaintiff but has hitherto wholly failed and neglected so to do, whereby the said last mentioned goods, chattels and poultry have been and are wholly lost to the plaintiff, and it is further averred that the plaintiff is the lawful holder of the said receipt or bill of lading; Wherefore the plaintiff says that it is injured and has sustained damages to the amount of Five Thousand Dollars, and therefore it brings this suit, etc.

G. GALE GILBERT,
*Attorney for Plaintiff.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

COLLINS PRODUCE CO.

vs.

C. & E. I. R. R. Co.

I, Burrell Hawkins, Clerk of the Circuit Court of said County, in the state aforesaid, do hereby certify that on the 9th day of December, A. D. 1913, being within ten days of the first publication of the notice hereunto appended, I sent by mail a copy of said
8 notice to Chicago and Eastern Illinois Railroad Company, defendant, at Chicago, Illinois. (McCormick Building) and to William J. Jackson, President of said Chicago and Eastern Illinois Railroad Company at Chicago, Illinois, (McCormick Building).

Witness my hand and seal of said Court, this 9th day of December, A. D. 1913.

[SEAL.] BURRELL HAWKINS, *Clerk.*

Endorsed: Circuit Court, Jefferson County, Jan. Term, 1914. Collins Produce Company vs. C. & E. I. R. R. Co. Certificate of Mailing Attachment Notice. Filed this 9th day of Dec. 1913. Burrell Hawkins, Clerk."

*Notice of Publication in Assumpsit.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

In the Circuit Court of Jefferson County, Illinois, January Term, 1914.

COLLINS PRODUCE COMPANY, a Corporation, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, a Corporation, Defendant.

In Assumpsit.

Demand, $5,000.00.

The Sheriff of said county having made return of summons in this cause that no officer or agent of the above named defendant is or can be found in this county, and the plaintiff having filed the affidavit required by law to authorize service to be made on the defendant by publication of notice.

Therefore, notice is hereby given to you, the said Chicago and Eastern Illinois Railroad Company that a writ of Summons has been sued out of the office of the Clerk of the Circuit Court of said County of Jefferson at the suit of the said Collins Produce Company and against you the said Chicago and Eastern Illinois Railroad Company in Assumpsit for Five Thousand Dollars, directed to the Sheriff of said County to execute, which said writ has been returned by said Sheriff not served and stating that no officer or agent of the defendant Chicago and Eastern Illinois Railroad Company is or can be found in the said county of Jefferson and state of Illinois; and affidavit having also been filed herein on behalf of the plaintiff stating that upon diligent inquiry no officer or agent of said de-
9 fendant can be found in said county, that the defendant is a corporation organized and existing under and by virtue of the laws of the state of Illinois and that the principal Office and principal place of business of the defendant is in the city of Chicago, county of Cook and State of Illinois praying service of the writ by publication as is provided by law.

Now, unless you, the said Chicago and Eastern Illinois Railroad Company shall personally be and appear before the Circuit Court of said county on the first day of the next regular term thereof, to be holden at the court House in the City of Mt. Vernon in said county on the 12th day of January, A. D. 1914, next, and plead to said action, judgment will be entered against you in favor of the said plaintiff for such sum as may appear to be due to said plaintiff herein, not to exceed the above demand of the plaintiff, together with the costs of this suit.

Mt. Vernon, Illinois, December 8th, 1913.

BURRELL HAWKINS, *Clerk.*

G. GALE GILBERT,
*Plaintiff's Attorney.*

The Daily Register.

*Certificate of Publication.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

Mt. Vernon, Ill.,
Jan. 8, 1914.

I, Maurice J. Seed, do hereby certify that I am the printer and publisher of the Daily Register, printed and published in the city of Mt. Vernon in the county aforesaid, and in which place is situated my principal office therefor; I further certify that the Daily Register is a secular newspaper which is, and for more than six months prior to the first publication herein certified to, has been printed and published regularly in the city, county and state aforesaid; I further certify that said newspaper has been printed and

published regularly every day of each week, except Sundays, during the time of the publication of which certificate is hereby made.

I further certify that a notice, of which a true copy is hereto attached has been published four weeks in the said Daily newspaper, the first publication thereof having been made on the 8th day of December, A. D. 1913, and the last publication thereof having been made on the 7th day of January, A. D. 1914, and that the same was published in each Daily edition between the dates aforesaid.

Given under my hand this 8th day of January, A. D. 1914.

MAURICE J. SEED, *Publisher.*

Printer's fee $14.00.

Endorsed: "Filed Jan. 8, 1914. Burrell Hawkins, Clerk of the Circuit Court, Jefferson County."

*Notice of Publication in Assumpsit.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

In the Circuit Court of Jefferson County, Illinois, January Term, 1914.

COLLINS PRODUCE COMPANY, a Corporation, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, a Corporation, Defendant.

In Assumpsit.

Demand, $5,000.00.

The Sheriff of said county having made return of summons in this cause that no officer or agent of the above named defendant is or can be found in this county, and the plaintiff having filed the affidavit required by law to authorize service to be made on the defendant by publication of notice.

Therefore, notice is hereby given to you, the said Chicago and Eastern Illinois Railroad Company that a writ of Summons has been sued out of the office of the Clerk of the Circuit Court of said County of Jefferson at the suit of the said Collins Produce Company and against you the said Chicago and Eastern Illinois Railroad Company in Assumpsit for Five Thousand Dollars, directed to the Sheriff of said County to execute, which said writ has been returned by said sheriff not served and stating that no officer or agent of the defendant Chicago and Eastern Illinois Railroad Company is or can be found in the said county of Jefferson and state of Illinois, and affida-

vit having also been filed herein on behalf of the plaintiff stating that upon diligent inquiry no officer or agent of said defendant can be found in said county; that the defendant is a corporation organized and existing under and by virtue of the laws of the state of Illinois, and that the principal office and principal place of
11 business of the defendant is in the City of Chicago, County of Cook and State of Illinois praying service of the writ by publication as is provided by law.

Now, unless you, the said Chicago and Eastern Illinois Railroad Company shall personally be and appear before the Circuit Court of said county on the first day of the next regular term thereof, to be holden at the Court House in the city of Mt. Vernon, in said county on the 12th day of January, A. D. 1914 next, and plead to said action, judgment will be entered against you in favor of the said plaintiff for such sum as may appear to be due to said plaintiff herein, not to exceed the above demand of the plaintiff, together with the costs of this suit.

Mt. Vernon, Illinois, December 8th, 1913.

BURRELL HAWKINS, *Clerk.*

G. GALE GILBERT,
*Plaintiff's Attorney.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

In the Circuit Court of Jefferson County, January Term, 1914.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Assumpsit.

Demand, $5,000.00.

*Petition for Removal to the United States District Court.*

To the Honorable Circuit Court of Jefferson County, Illinois:

Your petitioner, Chicago and Eastern Illinois Railroad Company, an Illinois corporation, appearing specially and for the sole and single purpose of presenting this petition, respectfully shows:

That this action was begun by plaintiff in the Circuit Court of Jefferson County, Illinois, on or about December 8th, 1913;
12 that on December 8th, 1913, the plaintiff filed its declaration herein, in the office of the Clerk of said Circuit Court of Jefferson County at the city of Mt. Vernon, Illinois; that at the time of the institution of this action said Circuit Court of Jefferson County was in vacation; that said cause is still pending and undetermined; that the next term of said court to be begun and held

after the institution of this action, commences on the 12th day of January, A. D. 1914 next; that said cause has not yet been tried; that defendant has not pleaded or answered to plaintiff's declaration; that the defendant is not required under the laws of this state or the rules of this court to plead to said declaration until the 13th day of January, A. D. 1914.

That said action is a suit of a civil nature in which plaintiff seeks to hold the defendant liable for damages caused by defendant's alleged failure to transport and deliver a certain carload of poultry shipped by the plaintiff from the Village of Cypress in Johnson County, Illinois, on or about March 21, 1913, consigned to the city of Newark in the state of New Jersey, for which it is alleged the defendant issued a bill of lading to the plaintiff, all of which appears in plaintiff's declaration filed herein; that by the allegations of the declaration, plaintiff's alleged cause of action arises under the Constitution and laws of the United States; that by said declaration the plaintiff bases its cause of action upon the laws of the United States, particularly Section 20 of an act of the Congress of the United States, entitled "An Act to Regulate Commerce," as amended and in force at the time plaintiff's alleged cause of action accrued;

That the matter in dispute in this action exceeds, exclusive of interest and costs, the sum of $3,000.00.

Wherefore, your petitioner prays for the removal of said suit into the District Court of the United States, to be held in the District where such suit is pending, viz: the District Court of the United States in and for the Eastern District of Illinois, and makes and files with this petition a bond with good and sufficient surety for its entering in such District Court on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said District Court of the United States, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for its appearing and entering special bail, if requisite therein, and your petitioner prays this court to pro-
13 ceed no further herein, except to make an order for the removal of this cause to said District Court of the United States and to accept said surety and bond and to cause the record herein to be removed into said District Court of the United States in and for the Eastern District of Illinois.

And your petitioner will ever pray.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,
By WILLIAM J. JACKSON, *Its President.*

STATE OF ILLINOIS,
*County of Cook, ss:*

I, William J. Jackson, being duly sworn, upon my oath depose and say that I am President of the above named defendant corporation, Chicago and Eastern Illinois Railroad Company; that I have read the above and foregoing petition; that the same is true in substance and in fact.

WILLIAM J. JACKSON.

Subscribed and sworn to before me this 19th day of December, 1913.

[N. P. SEAL.] HOMER T. DICK,
*Notary Public.*

HOMER T. DICK,
*Chicago, Illinois;*
ALBERT WATSON,
*Mt. Vernon, Ill.,*
*Attorneys for Defendant.*

Endorsed: Collins Produce Company vs. C. & E. I. R. R. Co. In the Circuit Court of Jefferson County, Illinois. Defendant's Petition for Removal to United States District Court. Copy. Filed Jan. 12, 1914. Burrell Hawkins, Clerk of the Circuit Court, Jefferson County. Refiled by leave of Court, Jan. 23rd, 1914, at 11:36 A. M. Burrell Hawkins, Clerk of the Circuit Court. Albert Watson, Homer T. Dick, Attorneys for Petitioner."

14 STATE OF ILLINOIS,
*Jefferson County, ss:*

In the Circuit Court of Jefferson County, January Term, A. D. 1914.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

*Bond for Removal.*

Know all men by these presents, that we, Chicago and Eastern Illinois Railroad Company, an Illinois Corporation, as Principal, and the United States Fidelity and Guaranty Company, a Maryland Corporation, as surety are held and firmly bound unto the Collins Produce Company, the above named plaintiff, in the sum of $1000.00, lawful money of the United States of America, to be paid to the said Collins Produce Company, its successors and assigns, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is as follows: Whereas, on or about the 8th day of December, 1913, an action was brought by the said Collins Produce Company against the said Chicago and Eastern Illinois Railroad Company in the Circuit Court of Jefferson County, Illinois, that such action arose under the constitution and laws of the United States and is removable into the District Court of the United States for the Eastern District of Illinois, under and by virtue of the Act of Congress in such case made and provided; and

Whereas, said Chicago and Eastern Illinois Railroad Company has filed its Petition in said Circuit Court of Jefferson County, Illi-

nois, for the Removal of said Action into the District Court of the United States for the Eastern District of Illinois:

Now therefore, if the above bounden Chicago and Eastern Illinois Railroad Company, or its successors or assigns, shall enter or cause to be entered in the District Court of the United States for the Eastern District of Illinois, on the 1st day of the next term thereof, a copy of the record in this action, and shall pay all costs that may be awarded by said United States District Court, if said United States District Court shall hold that this action was wrongfully or improperly removed thereto, and shall then and there enter special bail in said action, if the same was originally requisite therein, and do and perform all other things required by law to be done on the removal of actions from State to United States Courts, then the above obligation to be void, otherwise to be and remain in full force and effect.

In testimony whereof, The Chicago and Eastern Illinois Railroad Company has caused this bond to be executed by William J. Jackson, its President and the United States Fidelity and Guaranty Company has caused the same to be executed by John I. Scull, its attorney in fact, and have hereunto set their hands and seals.

Sealed with *out* seals this 22d day of December, 1913.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

[COR. SEAL.]

By WILLIAM J. JACKSON, *President.*

Attest:

H. J. CRONIN,
*Ass't Secretary.*

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[COR. SEAL.]

By JOHN I. SCULL, *Attorney in Fact.*

STATE OF ILLINOIS,
*County of Cook, ss:*

I, Joseph R. McDonald, a Notary Public, in and for the County and state aforesaid, do hereby certify that John I. Scull, Attorney in fact of the United States Fidelity and Guaranty Company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such Attorney in fact, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument of writing as his free and voluntary act, and as the free and voluntary act of the said the United States Fidelity and Guaranty Company for the uses and purposes therein set forth, and cause- the corporate seal of said company to be thereto attached.

Given under my hand and Notarial Seal this 22d day of December, A. D. 1913.

My Commission will expire November 27th, 1916.

[N. P. SEAL.] JOSEPH R. McDONALD,
*Notary Public.*

16 *Certified Copy Power of Attorney.*

16837.

Know all men by these presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office in the city of Baltimore, in the state of Maryland, does hereby constitute and appoint George E. Brennan, Frank J. Gaulter, Leo K. Solomon, John H. McGibbons, Gordon H. Fox, and John I. Scull, of the City of Chicago, state of Illinois, its true and lawful attorneys in and for the state of Illinois, for the following purposes, to-wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and peform any and all acts and things set forth in the resolution of the Board of Directors of the United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors hereby ratifies and confirms all and whatsoever any one of the said George E. Brennan, and the said Frank J. Gaulter and the said Leo K. Solomon and the said John H. McGibbons and the said Gordon H. Fox, and the said John I. Scull may lawfully do in the premises by virtue of these presents.

In witness whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signature of its vice President and assistant secretary, this 12th day of August, A. D. 1913.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

(Sig.) By ALEXANDER PAYSON KNAPP,
*Vice-President.*

(Sig.) WM. T. MORGAN,
[SEAL.] *Assistant Secretary.*

17 STATE OF MARYLAND,
*Baltimore City, ss:*

On this 12th day of August, A. D. 1913, before me personally came Alexander Payson Knapp, Vice President of the United States Fidelity and Guaranty Company, and Wm. T. Morgan, Assistant Secretary of said Company with both of whom I am personally acquainted, who by me being severally duly sworn, said that they re-

sided in the city of Baltimore, Maryland, that they, the said Alexander Payson Knapp and Wm. T. Morgan, were respectively the Vice President and Assistant Secretary of the United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing power of attorney; that they each knew the seal of said corporation; that the seal affixed to the said power of attorney was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice President and Assistant Secretary, respectively, of said company. My commission expires the first Monday in May, A. D. 1914.

(Sig.) WILLIAM J. McFEELY, Jr.,
[SEAL.] *Notary Public.*

STATE OF MARYLAND,
*Baltimore City, ss:*

I, Stephen C. Little, Clerk of the Superior Court of Baltimore city which court is a court of record and has a seal, do hereby certify that William J. McFeely, Jr., Esquire before whom the annexed affidavits were made and who has thereto subscribed his name, was at the time of so doing, a Notary Public, of the state of Maryland, in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgements, or proofs of deeds to be recorded therein. I further certify that I am acquainted with the hand writing of the said Notary, and verily believe the signature to be his genuine signature.

In testimony whereof, I have hereto set my hand and affixed the seal of the Superior Court of Baltimore City, the same being a court of Record, this 12th day of August, A. D. 1913.

(Sgd.) STEPHEN C. LITTLE,
[SEAL.] *Clerk of the Superior Court of Baltimore City.*

18 *Copy of Resolution.*

That whereas, it is necessary for the effectual transaction of business that this company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States, in the Provinces of the Dominion of Canada, and the Colonies of New Foundland.

Therefore, Be it resolved that this company do and it hereby does authorize and empower its president or either of its vice presidents in conjunction with its Secretary or one of its Assistant Secretaries under its corporate seal to appoint any person or persons as attorney or attorneys in fact, or agent or agents of said company in its name and as its act to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trusts, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and under-

takings required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact or agents or agent to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may *my* law, municipal or otherwise, or by any Statute of the United States or of any state or territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland or by the rules, regulations, orders, customs, practice, or discretion of any board, body, organization, office or officer, local, municipal, or otherwise, be allowed, required or permitted to be executed, *make*, taken, given, tendered, accepted, filed or recorded, for the security or protection of, by and for any person or persons, corporation body, office, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or on any conditions which may be provided for in any such bond, recognizance, stipulation or undertaking, or anything in the nature of either of the same.

I, Wm. T. Morgan, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the board of Directors of said company, duly called and held at the office of the company, at the City of Baltimore, 19 on the 11th day of July, A. D. 1910, at which was present a quorum of said directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said company, of which resolutions the foregoing is a true copy and of the whole thereof.

In testimony whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 12th day of August, A. D. 1913.

[SEAL.] WM. T. MORGAN,
*Assistant Secretary.*

I, Wm. T. Morgan, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney given by the said company to George E. Brenna, Frank J. Gaulter, Leo K. Solomon, John H. McGibbons, Gordon H. Fox, and John I. Scull, of Chicago, Illinois, authorizing and empowering them to sign bonds as therein set forth.

Given under my hand and the seal of the said company at Baltimore this 12th day of August, A. D. 1913.

[SEAL.] WM. T. MORGAN,
*Assistant Secretary.*

Filed Jan. 12, 1914. Burrell Hawkins, Clerk.

Re-filed by leave of the court, January 23d, 1914, at 11.36 A. M. Burrell Hawkins, Clerk of the Circuit Court. Homer T. Dick & Albert Watson, Attorneys.

20 *Motion.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

In the Circuit Court of Jefferson County, January Term, 1914.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Assumpsit.

Demand, $5,000.00.

Petition for Removal to the United States District Court.

The Plaintiff, by G. Gale Gilbert, its attorney, appearing specially and for the sole and single purpose of presenting this motion, calls the attention of the court to the files in this cause, and respectfully shows to the court that the notice required by law to be given by the petitioner, before making application for the removal of this cause to the District Court of the United States, was not given.

That therefore this court is without jurisdiction to consider the petition and bond for such removal, and prays the court to strike said petition and bond from the files of this court.

G. GALE GILBERT,
*Attorney for Plaintiff.*

Endorsed: Collins Produce Company vs. C. E. I. R. R. Co. Motion. Filed Jan. 20, 1914, Burrell Hawkins, Clerk of the Circuit Court, Jefferson County. Re-Filed Jan. 23, 1914, Burrell Hawkins, Clerk of the Circuit Court, Jefferson County.

21 *Motion.*

STATE OF ILLINOIS,
*County of Jefferson, ss:*

In the Circuit Court, of the January Term, A. D. 1914.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Action of Assumpsit.

Now comes the defendant, by Albert Watson, and Homer T. Dick, its attorneys, upon hearing of the motion of the plaintiff to

strike from the files the motion, petition and bond of the defendant for removal of the above styled cause to the District Court of the United States in and for the Eastern District of Illinois, and presents and files this its cross motion, hereby moving the said Circuit Court for leave to withdraw its said petition, motion and bond and for leave in conjunction therewith to serve notice in writing as provided by section 29 of the Federal Judiciary Act which became effective January 1, 1912, that it will on the day of service of such notice refile its said motion, petition and bond for the removal of said cause to said District Court of the United States, and for leave to so file or refile its said motion, petition and bond for such removal of said cause.

And as part of this cross-motion the defendant gives the Court to know and be informed that at the time of filing said motion, petition and bond the counsel for the plaintiff, Honorable G. Gale Gilbert was and now is and for many years has been a resident of the said county of Jefferson and a practitioner at the bar of its said Circuit Court; also that at the time of the filing of said motion, petition and bond, to wit: on the morning of the first day of said term, said counsel had notice thereof verbally in open court, also that prior to the filing and presentation of said motion to strike it had not been brought to the attention of either attorney for the defendant that written notice thereof was required by statutory enactment or otherwise. Wherefore the defendant prays relief as in this motion set forth.

HOMER T. DICK AND
ALBERT WATSON,
*Attorneys for Defendant.*

22 *Motion.*

STATE OF ILLINOIS,
*County of Jefferson, ss:*

In the Circuit Court, of the January Term, A. D. 1914.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Action of Assumpsit.

Now comes Albert Watson of lawful age, who being first duly sworn, makes oath in this behalf and says:

I am one of the attorneys for the defendant in the above styled cause and in its behalf and in support of the cross motion or motion this day filed in its behalf and hereto attached make oath that the matters of fact recited and stated in said cross motion or motion are true as therein stated, in substance and in fact.

ALBERT WATSON.

Subscribed and sworn to before me this 21st day of January, A. D. 1914.

[SEAL.]

BURRELL HAWKINS,
*Clerk of Circuit Court.*

Endorsed: "Collins Produce Company vs. C. & E. I. R. R. Co. Def't. Cross Motion by Defendant. Filed Jan. 21, 1914, Burrell Hawkins, Clerk of the Circuit Court, Jefferson County. Homer T. Dick and Albert Watson, Att'ys, for Defendant."

23 *Notice.*

STATE OF ILLINOIS,
*County of Jefferson, ss:*

In the Circuit Court, of the January Term, A. D. 1914.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Action of Assumpsit.

The above named plaintiff is hereby notified that on the first day of said term the defendant filed in said court its petition and bond for the removal of said cause to the District Court of the United States in and for the Eastern District of Illinois; that on the 23d day of January, A. D. 1914, by leave of the court first had and obtained, it withdrew its said petition and bond, and that on the day of the date of service of this notice it will again file its said petition and bond and will move the said Circuit Court, in which the same will be filed to allow said petition and to transfer said cause to said District Court for further proceedings as provided by law.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Defendant,*
By HOMER T. DICK AND
ALBERT WATSON, *Its Attorneys.*

Endorsed: Copy. Collins Produce Company vs. Chicago and Eastern Illinois Railroad Company. Notice. Homer T. Dick and Albert Watson, Attorneys for Defendant.

24 *Order of Feb.* 5, 1914.

STATE OF ILLINOIS,
*County of Jefferson, ss:*

In the Circuit Court, of the January Term, A. D. 1914.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Assumpsit.

Damages, $5,000.00.

Now on this day, being Monday, January 12, 1914, the first judicial day of said term comes the defendant, the Chicago, and Eastern Illinois Railroad Company, by Homer T. Dick and Albert Watson, its attorneys, and the defendant files and presents its petition and bond for the removal of this cause to the District Court of the United States in and for the Eastern District of Illinois, and moves the court to allow the same, which motion the court takes under advisement until a later day of said term.

And now on this day, being Tuesday, January 20, 1914, the 8th judicial day of said term, come again the said parties, defendant represented as aforesaid, and the plaintiff by its counsel, G. Gale Gilbert, enters its special appearance, limited to the purposes of its motion, and moves the court to strike the petition and bond aforesaid from the files, because no written notice thereof was given by the defendant to the plaintiff or its attorney prior to the filing of the same, and thereupon the said motion is taken under advisement by the court until a later day of the said term.

And now on this day, being Wednesday, January 21, 1914, the 9th judicial day of said term, come again the said parties, represented as aforesaid, and the defendant by its said attorneys, by leave of the court first had and obtained, files herein its cross motion for leave to withdraw its said petition, bond and motion first hereinabove mentioned, to serve written notice of the proposed filing of the same and to refile the same, and the said cross motion is by the court taken under advisement until a later day of said term.

25 And now on this day, being Friday, January 23, 1914, the 11th judicial day of said term, come again the said parties, represented as aforesaid, and the court being now sufficiently advised the cross motion aforesaid is by the court allowed and the petition and bond aforesaid are by leave of the court withdrawn from the files herein by the defendant.

And now at a later hour of the day last aforesaid the defendant files and presents notice in writing to the plaintiff of its purpose to refile said petition and bond for removal on this day and move the

court for allowance of the same, together with proof of the service of such notice upon said attorney for the plaintiff, and now moves the court to order the certification of the said cause to the said District Court of the United States. And the plaintiff, by its said attorney, renews its said motion to strike the said petition and bond from the files, limiting its appearance to the purpose of its said motion. And the court being now sufficiently advised in the premises, doth overrule the said motion of the plaintiff to strike and doth allow the said motion of the defendant and doth grant the said petition for removal and approve the bond filed and refiled therewith; and the plaintiff, by its said attorney, excepts to said ruling of the court.

And it is now by the court considered and ordered that said petition and bond be and the same are hereby adjudged sufficient in form and in substance and that this cause should be and the same is hereby ordered transferred and certified from this court to the District Court of the United States in and for the Eastern District of Illinois; to which finding order and judgment the plaintiff, by its said attorney, then and there excepts.

Endorsed: "Collins Produce Company vs. C. & E. I. R. R. Co. Court Order Jan. Term, 1914. Filed Feb. 5, 1914. Burrell Hawkins, Clerk."

26 *Præcipe.*

STATE OF ILLINOIS,
*County of Jefferson, ss:*

In the Circuit Court, in Vacation, After the January Term, A. D. 1914.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Burrell Hawkins, Clerk of the Circuit Court aforesaid:

Assumpsit.

Damages, $5,000.00.

You are hereby requested to prepare at once a transcript of the record in the above styled cause and certify the same to the District Court of the United States in and for the Eastern District of Illinois, as provided by law and by the order of said Circuit Court, including the said transcript a copy of each of the files in said cause, in chronological order and the orders of court.

HOMER R. DICK AND
ALBERT WATSON,
*Attorneys for the Defendant.*

Endorsed: "Collins Produce Company vs. C. & E. I. R. R. Co. Præcipe for certified copy of files and orders of Court. Filed Feb. 12, 1914. Burrell Hawkins, Clerk of the Circuit Court, Jefferson County. Homer T. Dick and Albert Watson, Attorneys."

*Certificate of Clerk.*

STATE OF ILLINOIS,
*Jefferson County, ss:*

I, Burrell Hawkins, Clerk of the Circuit Court, in and for the said county in the state aforesaid, do hereby certify that the above and foregoing is a true and correct transcript of the record in a certain cause lately pending in said Circuit Court, wherein the Collins Produce Company was plaintiff and the Chicago and Eastern Illinois Railroad Company was defendant, being an Action of Assumpsit, including therein a true copy of each and every file in said cause, all orders of the court therein and the præcipe for said Transcript.
27 In Witness whereof I have hereunto set my hand and affixed the seal of said court this 12th day of February, A. D. 1914.

[SEAL.] BURRELL HAWKINS,
*Clerk of the Circuit Court Aforesaid*

Endorsed: "Transcript on Removal. Feb. 13, 1914. A. G. Davis, Clerk."

*Plea Filed Mar.* 27, 1914.

Be it remembered that afterwards on to-wit: March 27th, A. D. 1914, there was filed in the office of the Clerk of said Court, defendant's plea of general issue, which said plea is in the words and figures following, to-wit:

In the District Court of the United States, Eastern District of Illinois, March Term, A. D. 1914.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

And now comes the defendant, the Chicago & Eastern Illinois Railroad Company, by Homer T. Dick, General Attorney, and Albert Watson, its attorneys, and defend the wrong and injury, when, etc., and say that the said Chicago & Eastern Illinois Railroad Company, defendant, did not promise in manner and form as the plaintiff has

above thereof alleged. And of this the defendant puts itself upon the country.

HOMER T. DICK,
*General Attorney.*
ALBERT WATSON,
*Its Attorney.*

Endorsed: "Filed March 27th, 1914. A. G. Davis, Clerk."

Be it further remembered that afterwards on to-wit: April 27th, A. D. 1914, there was filed in the office of the Clerk of said Court a Motion for leave to file special pleas, which said motion is in the words and figures following to-wit:

28 *Motion Filed Apr.* 27, 1914.

UNITED STATES OF AMERICA,
*Eastern District of Illinois:*

May Term, A. D. 1914.

No. 915.

COLLINS PRODUCE COMPANY

vs.

C. & E. I. R. R. Co.

Anw now comes the defendant, Chicago & Eastern Illinois Railroad Company, by Whitnel & Browning and Homer T. Dick, its attorneys, and move- the court for leave to file in addition to the general issue already filed, the special pleas herewith tendered, and respectfully ask- that an order may be entered giving defendant leave to file special pleas.

WHITNEL & BROWNING,
HOMER T. DICK,
*Attorneys for Defendant.*

Endorsed: "Filed April 27th, 1914. A. G. Davis, Clerk."

*Order of Apr.* 28, 1914.

And afterwards on to-wit: April 28th, A. D. 1914, the following order of court was made and entered of record in said cause, to-wit:

In the District Court of the United States for the Eastern District of Illinois, Tuesday, April 28th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Now on this 28th day of April, A. D. 1914, on motion of Steely & Steely, Whitnel & Browning, and Homer T. Dick, attorneys for defendant, the defendant is, by the Court given leave to file its special pleas to the declaration herein.

29 *Special Pleas, Filed Apr.* 28, 1914.

And afterwards on the same day, to-wit: April 28th, A. D. 1914, the following special pleas were filed in the office of the Clerk of said Court, which said special pleas are in the words and figures to-wit:

United States District Court for the Eastern District of Illinois.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Assumpsit.

Special Pleas of Defendant Filed by Leave of Court.

Special Plea No. 1.

And for a further plea in this behalf, the defendant says the plaintiff ought not to have or recover of it, the defendant by reason of anything in the said declaration contained, because it, the defendant says that the failure of the defendant to safely carry and deliver the said goods, chattels and poultry, if any, from Cypress, in the county of Johnson, in the state of Illinois, to Newark, in the state of New Jersey, was wholly occasioned and caused by unprecedented rains and floods, amounting to an act of God, whereby the trestles, bridges and tracks of it, the defendant, at points intervening, were washed away and so impaired the said defendant could not, until the same were repaired, forward said shipment; that while the said poultry

contained in said shipment was being detained on account of the conditions aforesaid, in the State of Ohio, and the said poultry contained in said shipment, being of a perishable nature and requiring feed to sustain the same, the public authorities of the state of Ohio, through its executive department, refused to permit, and prevented this defendant, and the plaintiff, whose agent was then and there in charge of said shipment from obtaining the necessary feed for said poultry in said shipment, and then and there, at the instance and request of the said plaintiff, by and through its agent so in
30 charge of said poultry in said shipment, took possession and disposed of said poultry contained in said shipment for the use and benefit of the people in said flood district.

Wherefore, it, the defendant, says by reason thereof and not otherwise, the damage and injury complained of in plaintiff's said declaration, if any, was occasioned, and this the defendant is ready to verify.

By WHITNEL & BROWNING AND
HOMER T. DICK, *Its Attorneys.*

Special Plea No. 2.

And for a further plea in this behalf, the defendant says that the plaintiff ought not to have or recover against it, the defendant, because or on account of anything contained and alleged in it, the plaintiff's declaration, because it, the defendant says that the loss of damage to, and delay of the shipment of goods, chattels, property, fowls, etc., specified mentioned and named in the plaintiff's declaration, if any, were and was wholly caused and occasioned by the act of God and not otherwise, and this it, the defendant, is ready to verify, wherefore, etc.

By WHITNEL & BROWNING AND
HOMER T. DICK, *Its Attorneys.*

Special Plea No. 3.

And for a further plea in this behalf, the defendant says that it, the plaintiff ought not to have or recover against it, the defendant, by reason of anything alleged, stated or contained in it-, the plaintiff's declaration, because it, the defendant, says that the failure of it, the defendant, to safely transport and deliver said shipment pursuant to its obligation as a common carrier, was wholly due to an act of God and not otherwise; that after it, the defendant, had received said shipment at Cypress, Illinois, to be transported over its, the defendant's line and the lines of connecting carriers to Newark in the state of New Jersey, and after it, the defendant had issued its receipt or bill of lading therefor, as required by law, and while said shipment was by it and connecting carriers being safely and promptly carried and transported and was crossing the State of Ohio, there occurred an unprecedented rain and flood, amounting to an act of God, whereby and by reason whereof and not otherwise, the tracks, trestles,
31 bridges and lines of the railway over which said shipment was being transported, and the tracks, trestles, bridges and lines

of other railways at said place were washed away, and so impaired that the said shipment could not be forwarded, and the said shipment was by said flood, the act of God aforesaid, destroyed, wherefore it, the defendant, was unable to transport and deliver same, and this, the defendant, is ready to verify, wherefore, etc.

By WHITNEL & BROWNING AND
HOMER T. DICK,
*Attorneys for Defendant.*

Special Plea No. 4.

And for a further plea in this behalf, the defendant says the plaintiff ought not to have or maintain its said action against, or recover against it, the defendant, because or on account of anything contained, set forth or alleged in its, the plaintiff's declaration, because it, the defendant, says that the failure, if any, of it, the defendant, to safely carry, transport and deliver the said shipment, goods, chattels and poultry in plaintiff's declaration mentioned, if any delivered to it by the plaintiff, as alleged in plaintiff's declaration, from Cypress, in the county of Johnson, in the State of Illinois, to Newark in the state of New Jersey, was wholly occasioned and caused by acts and things for which it, the defendant is not responsible and which relieve it, the defendant from liability as such common carrier for loss and damage to such said shipment, that is to say, it the defendant, avers that after it, the defendant at Cypress, Illinois, had received said shipment in the plaintiff's declaration mentioned, to be transported over its, the defendant's lines and the lines of connecting carriers from Cypress, Illinois, to Newark, New Jersey, and after it, the defendant had issued to it, the plaintiff, receipt or bill of lading covering said shipment (if any receipt or bill of lading so issued) as by law required, and after said shipment had moved from Cypress and was en route, unprecedented rains, floods and cloudbursts occurred, such as amounted to an act of God, whereby the tracks, trestles, bridges and railroad of the connecting carriers over which said shipment was then passing or about to pass, were washed away and so impaired that said shipment could not be transported thereon, until the same were repaired, and that the tracks, bridges and trestles of other rail-
32 roads there were in like manner washed -way and impaired; that while the said shipment was so there at said point detained and delayed by reason of and on account of such said unprecedented rains and floods, and the result thereof amounting to an act of God as aforesaid, the said shipment, if any, being poultry, the same being of a perishable nature and requiring feed and care, and while same were then so detained and delayed — account of and the result of an act of God as aforesaid, in the state of Ohio, the public authorities of the state of Ohio, through its executive department, refused to permit and prevented this defendant, or the connecting carrier, and likewise prevented the plaintiff, which by its agent, was then and there in charge of said shipment, from obtaining the necessary food for said fowls contained in and constituting

said shipment, and said public authorities took charge of said shipment and reduced same to the possession of said State of Ohio, seized the same and disposed of the fowls constituting said shipment, for the said purposes of said State there, etc., and this the defendant is ready to verify, wherefore, etc.

By WHITNEL & BROWNING AND
HOMER T. DICK,
*Attorneys for Defendant.*

Special Plea No. 5.

And for a further plea in this behalf, the defendant says the plaintiff ought not to have or maintain its aforesaid action against it, this defendant because or on account of anything set up, or alleged in its, the plaintiff's declaration, because it, this defendant says that the failure of it, the defendant, to safely carry, transport and deliver the said shipment of fowls, cocks, chickens, ducks, geese and turkeys, to-wit: the goods and chattels named and described in the plaintiff's declaration, from Cypress, in the county of Johnson, in the state of Illinois, to Newark, in the state of New Jersey, was wholly occasioned and caused by acts and things for which it, the defendant, is not responsible, and which relieve it, the defendant, from liability as such common carrier, for loss and damage, if any, to such said shipment; that is to say, it the defendant, avers that after it, the defendant, at Cypress, Illinois, had received said shipment to be transported over its, the defendant's lines and the lines of connecting carriers from Cypress, Illinois to Newark, New Jersey, and after it, the defendant, had issued
33 and delivered to the plaintiff receipt or bill of lading, if any issued covering said shipment, as by law required, and after said shipment had moved from Cypress and was en route to Newark, New Jersey, there occurred in the state of Ohio and the surrounding territory and country an unprecedented rain, floods and cloudbursts such as amounted to an act of God, whereby and by reason whereof and as a result thereof the tracks, trestles, bridges and railroad of the connecting carriers over which said shipment was then passing or about to pass, were washed away and so impaired, damaged or destroyed that said shipment could not be transported thereover; and likewise the lines of railroad, at, about and around said place were all in like manner washed away and so impaired that the same could not be used for transporting freight; that as a result and on account of said act of God as aforesaid, the said shipment in the said plaintiff's declaration mentioned, stated and described, was halted and delayed and obstructed at a point and place in the state of Ohio; that at said time and said place the plaintiff, by and through its said agent, was accompanying and was in charge of and had supervision and control over the said shipment there; that the said shipment being of a perishable nature and requiring food to sustain the same, the public authorities of the state of Ohio, through its, the said State of Ohio's executive department, refused to permit and prevented this defendant and the plaintiff

whose agent was then and there in charge of said shipment from obtaining the necessary food for said poultry in said shipment. And the defendant avers that then and there at the instance and request of the said plaintiff, by and through its agents so then — there in charge of said shipment, the State of Ohio, through its officers took possession of, and pursuant to arrangement made with the plaintiff through its said agent, disposed of said shipment for the use and benefit of the people in said flood district, who were then and there in need of food; and the defendant avers that by reason of said shipment having been so disposed of by it, the plaintiff as aforesaid, it, the defendant and the connecting carrier were unable, after the said flood had subsided and the said railways had been repaired, to further transport to point of destination the said shipment, and this, the defendant is ready to verify, wherefore, etc.

By WHITNEL & BROWNING AND
HOMER T. DICK,
*Attorneys for Defendant.*

34 Special Plea No. 6.

And for a further plea in its behalf, the Defendant says the plaintiff ought not to have, or maintain its said action against, or recover against it, the defendant, because of, or on account of anything contained, set forth, or alleged, in its, the plaintiff's declaration, because it, the defendant, says that the failure, if any, of it, the defendant, and its connecting carriers, to safely carry, transport and deliver the said shipment, goods, chattels, and poultry in plaintiff's declaration mentioned, if any, delivered to it by the plaintiff, as alleged in plaintiff's declaration, from Cypress in the county of Johnson, in the State of Illinois, to Newark, in the state of New Jersey, was wholly occasioned and caused by acts and things for which it, the defendant, is not responsible, and which relieve it, the defendant from liability as such common carrier for loss and damage to such said shipment, that is to say, it the defendant avers that after it, the defendant, at Cypress, Illinois, had received said shipment in plaintiff's declaration mentioned, to be transported over its, the defendant's lines, and the lines of its connecting carriers, from Cypress, Illinois, to Newark, New Jersey, and after it, the defendant, had issued to the plaintiff a receipt or bill of lading covering said shipment, as by law was required, and after said shipment had moved from Cypress and was en route, unprecedented rains, floods and cloudbursts occurred, such as amounted to an act of God, whereby the tracks, trestles, bridges and railroad of the connecting carriers, over which said shipment was then passing, or was about to pass, were washed away and so impaired that said shipment could not be transported thereon, until same were repaired, and that the tracks, bridges and trestles of other railroads there were in like manner washed away and impaired; that while the said shipment was so there, at said point, to-wit: in the City of Dayton, County of Montgomery and state of Ohio, on the line of railroad of the Cincinnati, Hamilton and Dayton Railway Company, which was then

and there a connecting carrier of this defendant, in the route from said Cypress, in the state of Illinois, to Newark, in the state of New Jersey, and while the said shipment was so detained and delayed, by reason of, and on account of, such said unprecedented rains and floods, and the result thereof amounting to an act of God, as aforesaid, the public authorities of the state of Ohio, through its Executive Department, took charge of said shipment and reduced
35 the same to the possession of said state of Ohio, and seized the same and disposed of said shipment, for the use and benefit of the people of said flooded district, who were then and there in need of food; and the defendant avers that, by reason of said shipment having been thus disposed of, the defendant and its connecting carriers were unable, after the flood had subsided and the said railways had been repaired, to further transport to point of destination said shipment, and this the defendant is ready to verify, wherefore, etc.

By WHITNEL & BROWNING AND
HOMER T. DICK,
*Attorneys for Defendant.*

Endorsed: "Filed April 28, 1914, A. G. Davis, Clerk."

*Order of May 5, 1914.*

Be it remembered that on to-wit: May 5th, A. D. 1914, the following order of court was made and entered of record in said cause, to-wit:

In the District Court of the United States for the Eastern District of Illinois, Tuesday, May 5th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Now on this 5th day of May, A. D. 1914, on motion of L. O. Whitnel, attorney for defendant,

It is ordered by the court that the depositions taken and filed in this cause be now opened and published.

Filed May 6, 1914.

And afterwards on to-wit: May 6th, A. D. 1914, there was filed in the office of the Clerk of said Court a stipulation for proof under

general issue, which said stipulation is in the words and figures following, to-wit:

36 In the District Court of the United States, Eastern District of Illinois, March Term, A. D. 1914.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

Assumpsit.

It is hereby stipulated and agreed by and between the parties to the above entitled action, that all pleas heretofore filed in said cause, except defendant's plea of non assumpsit, shall be withdrawn, and that the defendant shall have the right to introduce any evidence and avail itself of any defense, in said cause which would be proper under any special plea or pleas which the defendant might, in the absence of this stipulation, have the right to plead in meeting the case stated by the plaintiff by its declaration filed in this case.

Dated May 6th, 1914.

G. GALE GILBERT,
*Attorney for Plaintiff.*
WHITNEL & BROWNING,
HOMER T. DICK,
*Attorneys for Defendant.*

Endorsed: "Filed May 6, 1914, A. G. Davis, Clerk."

And afterwards on to-wit: May 6th, A. D. 1914, the following further proceedings were had in said court and entered of record, to-wit:

37 *Trial.*

In the District Court of the United States for the Eastern District of Illinois, Wednesday, May 6th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Now on this 6th day of May, A. D. 1914, this cause being called for trial and both parties having announced ready, it is ordered and

adjudged by the court that a jury do come; whereupon, there comes a jury of twelve good and lawful men: to-wit: Harry Turner, R. H. Oliver, W. R. Burton, David R. Fish, Hud Orwin, Charles B. Raines, Charley Rey, Ernest W. Seiller, Leroy Shopp, C. F. Smith, G. W. Taylor and John W. Townsend, who are duly chosen, selected and sworn, to well and truly try the issues joined herein and a true verdict render according to the evidence. And now statements of counsel are made to the jury. And now at the close of the day this cause not having been concluded, it is continued until tomorrow.

And afterwards on to-wit: May 7th, A. D. 1914, the following proceedings were had in said Court in said cause and entered of record, to-wit:

38

*Trial.*

In the District Court of the United States for the Eastern District of Illinois, Thursday, May 7th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Now on this 7th day of May, A. D. 1914, come again the parties to this cause, by their respective attorneys and comes, also, the jury heretofore selected herein, and the trial of this cause again proceeds and evidence for the plaintiff is heard and concluded. And now at the close of the plaintiff's evidence comes the defendant, by its attorneys, and enters its motion for the Court to direct a verdict herein in favor of the defendant. Upon consideration thereof,

It is ordered and adjudged, by the Court, that said motion of defendant be and the same is hereby overruled. And now evidence for the defendant and in rebuttal is heard and concluded. And now again at the close of all the evidence adduced herein comes the defendant, by its said attorneys, and enters its motion for the Court to direct a verdict in favor of the defendant.

And now arguments of attorneys for the respective parties are heard upon the motion of defendant to direct a verdict and is by the Court taken under advisement. And at the close of the day this cause not having been concluded, it is continued until tomorrow.

And afterwards on to-wit: May 8th, A. D. 1914, the following proceedings were had in said court in said cause, and entered of record, to-wit:

39 *Trial.*

In the District Court of the United States for the Eastern District of Illinois, Friday, May 8th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Now on this 8th day of May, A. D. 1914, come again the parties to this cause, by their respective attorneys, and comes, also, the jury heretofore selected herein into open court and the trial of this cause again proceeds. And now this cause coming on for decision of the Court upon motion of defendants to direct a verdict in favor of the defendant, and the Court having heretofore heard the arguments of counsel thereon, and now being fully advised in the premises,

It is ordered and adjudged by the court, that said motion of defendant be and the same is hereby overruled.

And now arguments of counsel are made to the jury and the said jury now having heard all the evidence adduced by the respective parties hereto, the arguments of counsel and the charge of the court retire to consider their verdict.

And afterwards on to-wit: May 11th, A. D. 1914, the following proceedings were had in said court in said cause, and entered of record, to-wit:

40 *Verdict.*

In the District Court of the United States for the Eastern District of Illinois, Monday, May 11th, A. D. 1914.

Present: Honorable Francis M. Wright.

Case.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Now on this 11th day of May, A. D. 1914, comes the jury heretofore selected herein, into open court and for verdict say, "We, the

jury, find the issues for the plaintiff, and assess the plaintiff's damages at Four Thousand One Hundred Ninety-Five Dollars and eighty two cents ($4,195.82). Whereupon comes the said defendant, by its said attorney, and enters its motion for a new trial.

And afterwards on to-wit: May 19th, A. D. 1914, there was filed in the office of the Clerk of said Court defendant's motion for new trial, which said motion is in the words and figures following, to-wit:

41 *Motion. Filed May 19, 1914.*

UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Illinois.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Motion for New Trial.

Now comes the Chicago & Eastern Illinois Railroad Company, defendant in the above entitled cause, by Homer T. Dick, and Whitnel & Browning, its attorneys, after verdict of the jury, and before judgment, and moves the court herein to set aside the verdict of the jury in said cause, and to grant unto the defendant a new trial in said cause, and for reasons in support of said motion, shows to the court the following, to-wit:—

First. The verdict of the jury is contrary to the evidence in said cause.

Second. The verdict of the jury is contrary to the law in said cause.

Third. The verdict of the jury is contrary to the evidence and the law of the case.

Fourth. The Court erred in that it admitted upon the trial of said cause, over the objections of defendant, improper, irrelevant and inadmissible evidence offered for and on behalf of the plaintiff.

Fifth. The Court erred in that it refused to admit proper, relevant and competent evidence offered for and on behalf of the defendant upon the trial of said cause.

Sixth. The Court erred in refusing to sustain and in overruling and denying the motion of the defendant, at the close of all the evidence offered on behalf of the plaintiff, to direct a verdict in behalf of it, the defendant, and likewise erred in refusing and in marking "refused" the instruction in this behalf requested.

42 Seventh. The Court erred in refusing to sustain and in overruling and denying the motion of the defendant at the close of all the evidence introduced in said cause by both the plain-

tiff and defendant, to direct a verdict in behalf of it, the defendant, and likewise the Court erred in refusing and marking "refused" the instruction in this behalf requested.

Eighth. The evidence in said cause wholly fails to prove by the weight or preponderance any material allegation contained in said declaration.

Ninth. The weight and preponderance of the whole evidence establishes that the alleged failure to deliver the shipment of poultry in question to the consignees was not caused by this defendant or by its connecting carrier.

Tenth. The plaintiff failed to prove by the preponderance or greater weight of the evidence of said cause that the alleged failure to deliver said shipment of poultry was caused by it, the defendant, or by its connecting carrier or carriers.

Eleventh. The verdict of the jury is excessive in amount.

Therefore it, the defendant, says that it is entitled to a new trial in said cause and therefore prays the Court here to set aside the verdict of the jury and award to the defendant a new trial.

Respectfully submitted:

H. T. DICK,
WHITNEL & BROWNING,
*Attorneys for Defendant.*

Endorsed: "Filed May 19, 1914. A. G. Davis, Clerk."

And afterwards on to-wit: May 19th, A. D. 1914, the following proceedings were had in said court in said cause and entered of record, to-wit:—

43 *Order of May* 19, 1914.

In the District Court of the United States for the Eastern District of Illinois, Tuesday, May 19th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Now on this 19th day of May, A. D. 1914, come the parties to this cause, the plaintiff, by G. Gale Gilbert, its attorney, and the defendant, by H. T. Dick and L. O. Whitnel, its attorneys, into open court. And now this cause coming on for hearing upon motion of defendant for a new trial and the court now having heard the argu-

ments of counsel for the respective parties upon said motion for new trial and not now being fully advised in the premises, takes said cause under advisement.

And afterwards on to-wit: May 20th, A. D. 1914, the following proceedings were had in said Court in said cause and entered of record, to-wit:

*Judgment.*

In the District Court of the United States for the Eastern District of Illinois, Wednesday, May 20th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Now on this 20th day of May, A. D. 1914, this cause coming on for decision of the court upon motion of defendant for a new trial and the Court having heretofore heard arguments of counsel for the respective parties upon said motion and then having
44 taken said cause under advisement, and now after due deliberation and being fully advised in the premises,

It is ordered and adjudged by the Court that said motion of defendant for a new trial in this cause be and the same is hereby overruled.

It is therefore considered, ordered and adjudged by the Court that the said plaintiff, Collins Produce Company, have and recover of and from the defendant, Chicago and Eastern Illinois Railroad Company, the sum of Four Thousand One Hundred and Ninety-Five Dollars and eighty-two cents ($4,195.82), so found by the jury as plaintiff's damages in this cause, together with all costs in and about this cause expended and that execution issue therefor. Whereupon, the defendant, by its attorney, excepts to the ruling and judgment of the court and is by the court given ninety days in which to present a bill of exceptions.

*Bill of Exceptions.*

And afterwards on to-wit: June 23d, A. D. 1914, there was filed in the office of the Clerk of said Court the defendant's Bill of Exceptions in said cause, which said Bill of Exceptions is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
*State of Illinois, ss:*

In the District Court of the United States for the Eastern District of Illinois, March Term, A. D. 1914.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

Appearances.

For the Plaintiff: Mr. G. Gale Gilbert.
For the Defendant: Messrs. Whitnel & Browning and Homer T. Dick.

Now Be It Remembered that on the trial of this cause at this term, in the District Court of the United States, for the Eastern District of Illinois, the Honorable Francis M. Wright, Judge, presiding, and a jury, the plaintiff, to sustain the issues on its behalf, introduced the following evidence, that is to say:

45 *Testimony of W. A. Adams.*

W. A. ADAMS, called as a witness on behalf of the plaintiff being first duly sworn, testified as follows:

Direct examination.

By Mr. Gilbert:

Q. State your name.
A. W. A. Adams.
Q. Where do you live?
A. Cypress, Illinois.
Q. What is your business?
A. Manager produce house, Collins Produce Company.
Q. Collins Produce Company?
A. Yes.
Q. Were you manager of the produce house of the Collins Produce Company at Cypress, Illinois, on the 21st of March, 1913?
A. I was.
Q. Who was the agent of the Chicago & Eastern Illinois Railroad at that place on that day?
A. Mr. Brown.
Q. Who?
A. E. E. Brown.

Q. Did you have occasion to ship or offer for shipment a car of live poultry at that point on that day?

A. Yes, on March 21st.

Q. Did you receive from the agent at Cypress, Illinois, a receipt or other paper upon delivery of the poultry?

A. Yes, sir, that is the bill of lading I received.

Q. Did you pay the agent at Cypress anything at that time?

A. Yes, the advance charges were paid.

Q. What amount?

A. One hundred and ninety dollars and forty cents, as well as I remember.

Q. I will ask you if you paid anything more than the regular tariff at that time?

A. Well, I paid the stop-off charges.

Q. What do you mean by that?

A. That is the charge charged by the Company for stopping the car for reloading or finishing loading.

Q. What, if anything, did you pay in addition for the stop at Mount Vernon to put in additional poultry?

A. I believe three dollars was what was required.

Q. What was the amount additional that you paid for the privilege of finishing loading at Vincennes?

46 A. Five dollars.

Q. These items were included in the one hundred and ninety dollars and forty cents freight that you prepaid to the agent at Cypress?

A. Yes, sir, all included.

Q. What was the number and kind of car used in this shipment?

A. It was an L. P. T. car.

Q. Tell the jury what you mean by that?

A. Live Poultry Transportation car—a car made for the purpose of shipping poultry, live poultry—I believe the number was 739, as well as I remember.

Q. I will ask you to examine the paper which I hand you and state whether or not that is a photograph of the type of car or character of car used for this shipment?

A. Yes.

Mr. Whitnel—We object to that—we don't see the relevancy of that.

The Court: Is that a photograph of that car or some other car?

Mr. Gilbert: Of a similar car.

The Court: I don't think it is material unless it is a photograph of the same car.

Mr. Gilbert: It is built exactly the same and is the same car in its makeup.

The Court: I think he can describe the car they were shipped in—that would be sufficient—I suppose there is no dispute about that—both sides seem to agree about it—it is immaterial.

Q. Mr. Adams, please state the amount of poultry placed by you in the car at Cypress.

A. The number of pounds was twenty-six hundred and fifteen placed in the car at Cypress.

Q. Can you state the amount of pounds of each kind in poultry loaded?

A. Not without referring to my report of that date.

Q. Have you any memorandum to which you can refer that will enable you to give the amount?

A. Yes I have.

Q. You may refer to that.

A. You want the number of pounds of each kind do you?

Q. Yes.

A. Fowls, hens, 2316, young chickens, 77, old cocks, 87, ducks 22, geese 72, turk-s 41, total 2615 pounds.

47 Cross-examination.

By Mr. Whitnell:

Q. I notice the bill of lading shows 18,000—is that merely for car loading shipping?

A. Yes.

Q. Did you put in the car 2,615 pounds?

A. Yes but we paid on 18,000.

Q. You paid a total of $190.40?

A. Yes, sir $190.40.

Q. You paid three dollars for the right to load an additional amount in the car at Mount Vernon?

A. Yes.

Q. And five dollars for a similar purpose at Vincennes, Indiana.

A. Yes.

Q. Now that charge was to cover transportation to destination?

A. Yes sir, transportation, car rental and stop-offs.

The Court: The value I suppose is stated in the receipt?

Mr. Dick: No, the weight is shown but no value.

Mr. Gilbert: I wish to offer in evidence at this time the bill of lading.

Mr. Whitnel: We have no objection.

The Court: You may consider it in and read it later.

The bill of lading is admitted in evidence and marked Plaintiff's Exhibit A, in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT A.

*Uniform Bill of Lading.*

Standard for *of* Straight Bill of Lading Approved by the Interstate Commerce Commission by Order Number 787 of June 27, 1908.

Chicago and Eastern Illinois Railroad Company.

Straight Bill of Lading—Original—Not Negotiable.

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Cypress, Illinois 3/1/1913 from Collins Prod. Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise
48 to deliver to another carrier on the route to said destination.

It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written herein contained, (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The rate of freight from Cypress, Ills., to Newark, N. J. is in cents per 100 lbs.

If Special per 100# 78c.

Consigned to C. E. Barker & Co.

Destination Newark, State of N. J. County of ——.

Route C. & E. I. and B. & O. Car Initial L. P. T. Car No. 739.

| No. packages. | Description of articles and special marks. | Weight (Subject to correction). |
|---|---|---|
| | Live Poultry. | 18,000. |

Stop at Mt. Vernon and Vincennes to finish loading.

If charges are to be prepaid, write or stamp here 'To be Prepaid.'

Prepaid.

Charges advanced $42.00.

COLLINS PRODUCE CO., *Shipper*,
Per W. A. ADAMS.

Received, $190.40 to apply in prepayment of the charges on the property described herein.

E. E. BROWN, *Agent*.

Conditions.

Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier nor party in possession of any of the property herein described shall be liable for any loss thereof or any damage thereto, or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights.

For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival
49 of the property at destination, or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of a carrier or party in possession (and the burden to prove freedom from such negligence shall be in the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage or delay while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property, or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper, the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading, this Company agrees to transport only over its own line and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route nor after said property has been delivered to the next carrier except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon. Every carrier shall have the right, in case of physical necessity, to forward said property by any railroad or route between the point of shipment and the point of destination, but if such diversion shall be from a rail to a water route, the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment, under this bill of lading, unless a lower value has been represented
50 in writing by the shipper or has been agreed upon or is determined by the classification and tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for de-

livery has elapsed. Unless claims are so made, the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property so far as this shall not avoid the policies or contract of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cast. Each carrier over whose route cotton is to be transported hereunder shall have the privilege at its own cost and risk of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator may, unless otherwise expressly noted herein, and then if it is not promptly unloaded, be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery for the carrier or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier removed to, and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays) for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

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Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels and when received from or delivered on private or other sidings, wharves or landings shall be at the owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie or for any article of extraordinary value not specifically rated in the published classification or tariffs unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods without previous full written disclosure to the carrier of their nature shall be liable for all loss or damage caused

thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid on the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in Section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea or other waters; or from explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances; or from collision, stranding or other accidents of navigation or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the
52 liberty to call at intermediate ports to tow and be towed, and to assist vessels in distress and to deviate for the purpose of saving life or property.

The *turn* 'water carriage' in this section shall not be construed as including lighterage across rivers or in lake or other harbors and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

*Testimony of J. W. Begg.*

J. WALTER BEGG, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Gilbert:

Q. State your name.
A. J. Walter Begg.
Q. Where do you live?
A. Vincennes, Indiana.
Q. What is your business?
A. Manager Collins Produce Company.
Q. At that point?
A. Yes.
Q. I will ask you whether or not, on or about the 23rd of March, 1913, you had occasion to load any live poultry in car L. P. T. 739?

A. Yes.

Q. I wish you would tell the jury the kind of fowls and weight of the fowls.

A. There was some poultry came over from Flora by local freight—I think there was 2619 pounds of hens, 354 pounds of chickens 647 pounds of cocks, 100 pounds of ducks, 60 pounds of geese, 109 pounds of turkeys and two guineas, making a total of 3889 pounds that came from Flora by local freight and was loaded into this car—then we had at Vincennes 7791 pounds of hens 245 pounds of chickens, 214 pounds of cocks, 84 pounds of ducks and 8 pounds of geese, making a total of 8342 pounds—besides that, we loaded in forty bags of cracked corn, 1000 pounds of whole corn and 500 pounds of wheat.

Q. For feed?

A. For feeding purposes on the tr-p.

53 Cross-examination.

By Mr. Whitnel:

Q. At the time this poultry was loaded at Vincennes, the total loaded was 3889 pounds plus 8342 pounds?

A. Making a total of 12231, both weights combined.

Q. Where was the car at the time that was loaded in?

A. It was set at our poultry house in Vincennes, right on the side track.

Q. What railroad?

A. Baltimore & Ohio.

Q. It was not on the side track of the Chicago & Eastern Illinois.

A. No sir.

Q. It was on the tracks of the Baltimore & Ohio?

A. Yes.

Q. Did that car come from Salem, Illinois, over the tracks of the Baltimore & Ohio to Vincennes?

A. I guess it did.

Mr. Whitnel: We desire to interpose an objection to any right of the plaintiff to recover for poultry loaded in this car off the line of the Chicago & Eastern Illinois Railroad and on the tracks of another railroad.

The Court: I understand that property is covered by the receipt—I will rule on that later.

*Testimony of J. C. Begg.*

J. C. Begg, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Gilbert:

Q. State your name.

A. J. C. Begg.
Q. Where do you live?
A. Mount Vernon.
Q. What is your business?
A. Produce business.
Q. State whether you are connected with the Collins Produce Company?
A. I am.
Q. In what capacity?
A. Vice President and General Manager.
Q. How long have you been connected with the Collins Produce Company?
54 A. Seven and one half years.
Q. How long have you been engaged in the produce business?
A. Fourteen years.
Q. I will ask you whether or not Mount Vernon is the principal office of this Produce Company?
A. General office.
Q. And you have charge of that office?
A. Yes.
Q. Mr. Begg, if you had occasion to load any live poultry into car L. P. T. 739 about the 22nd of March, 1913, I wish you would state the fact.
A. Yes, I loaded in for the Centralia house, which was loading at Mount Vernon, 855 pounds, consisting of 629 pounds of hens 101 pounds of chickens, 97 pounds of roosters and 28 pounds of turkeys, making a total of 855 pounds; for the Mount Vernon house 5913 pounds of hens, 323 pounds of roosters, 362 pounds of chickens, 67 pounds of ducks, 65 pounds of geese and 49 pounds of turkeys, making a total of 6779 pounds.
Q. Can you tell the total amount of poultry of different kinds that was loaded into this car—have you an invoice by which you can determine the total amount of the various kinds?
A. Yes sir, I have.
Q. Give that to the jury.
A. A total of 19268 pounds hens, 1368 pounds cocks or roosters, 1139 pounds of chickens, 273 pounds of ducks, 206 pounds of geese and 227 pounds of turkeys, together with two guineas, making a total of 22481 pounds.
Q. This car of poultry was consigned, as appears from the bill of lading, to C. E. Barker & Company, Newark, New Jersey?
A. Yes.
Q. I will ask you if you ha ve a complete invoice there in your possession of the various items of property included in this car.
A. I have.

Mr. Gilbert: We offer in evidence this invoice which has been marked Plaintiff's Exhibit C.
Mr. Whitnel: Are these the weights covering the property on this shipment claimed to be loaded at Cypress, Mount Vernon and Vincennes?

The Witness: Yes.

55 Mr. Whitnel: Are the weights stated here the same as have been stated by Mr. Adams and Mr. Begg?

The Witness: With the exception of Mount Vernon.

Mr. Whitnel: We have no objection to this invoice, Plaintiff's Exhibit C.

The invoice is admitted in evidence without objection having been marked Plaintiff's Exhibit C, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT C.

Collins Produce Company,
Incorporated,
Wholesale Dealers in Poultry, Butter, Eggs, etc.

General Manager: J. Cyril Begg.
General Offices: Mt. Vernon. Ill.

MOUNT VERNON, ILLINOIS, 3/22/1913.

L. P. T. Car #739.
Shipley in Charge.

Sold to C. E. Barker & Co., Newark, New Jersey.
Contains as follows:

| | | Mt. Vernon. | | Centralia. | | Flora. | |
|---|---|---|---|---|---|---|---|
| Fowls | 19268# | Fowls | 5913# | Fowls | 629# | Fowls | 2619# |
| Cocks | 1368 | Cocks | 323 | Chix | 101 | Chix | 354 |
| Chix | 1139 | Chix | 362 | Chix | ... | Cocks | 647 |
| Ducks | 273 | Ducks | 67 | Cox | 97 | Ducks | 100 |
| Geese | 206 | Geese | 65 | Turks | 28 | Geese | 60 |
| Turks | 227 | Turks | 49 | | | Turks | 109 |
| | 22481# | | 6779# | | 855# | | 3889# |

2 guineas. 2 guineas.

| Vincennes. | | Cypress. | |
|---|---|---|---|
| Fowls | 7791# | Fowls | 2316# |
| Chix | 245 | Cocks | 87 |
| Cocks | 214 | Chix | 77 |
| Goose | 9 | Geese | 72 |
| Ducks | 84 | Ducks | 22 |
| | | Turks | 41 |
| | 8343# | | 2615# |

Freight Prepaid.

Q. State if you received the letter you have in your hand in due course of business.

A. Yes sir, it is a confirmation of the sale of this car of poultry.

56 Mr. Gilbert: We offer in evidence the letter which has just been identified by the witness.

Mr. Whitnel: We object to it—this seems to be a letter written by C. E. Barker to Charles Collins Company in New York City.

Q. This letter addressed to the Charles Collins Company at Jay and West Streets, New York, I will ask you whether or not the Charles Collins Company were your agents in New York for this car of poultry.

A. Yes sir, they are connected with our firm—they are our New York representatives.

Mr. Gilbert: We renew our offer.

The Court: The object of this letter, I suppose, is to prove the value of the property—I don't know that anybody identified this as being a contract—perhaps that will be done later, I don't know—I don't know that the witness stated this was the letter of Barker & Company.

The Witness: I did state that it is a confirmation of sale.

The Court: You know it is their letter?

The Witness: Yes.

The Court: Of course, if he knows that, it becomes a contract—it is a contract to pay what they say they will pay, so much a pound for these fowl—I think that is competent.

Mr. Whitnel: We except.

The letter is admitted in evidence and marked Plaintiff's Exhibit D and read to the jury, in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT D.

C. E. Barker & Co.,
Wholesale Commission Merchants,
Dealers in Country Produce of Every Kind and Variety,
38 Commerce St.

NEWARK, N. J., March 20, 1913.

Chas. Collins Co., Jay & West St-., New York.

GENTLEMEN: As per telephone conversation we hereby confirm sale of L. P. T. Car #739 at the following prices delivered Newark, N. J. Fowl and chickens, 20c., roosters 14c., ducks 22c., and
57 geese 14c. Car to be shipped out not later than March 22nd, 1913.

Yours truly,
(Signed) C. E. BARKER & CO.

Mr. Whitnel: I desire to call the Court's attention in this connection to the bill of lading—this letter seems to be a statement of the price to be paid in New Jersey—the contract or bill of lading provides that the price of the property at the place it was received, Cypress, would govern, and not the price in New Jersey.

The Court: The bill of lading states that 'any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee at the place and time of shipment'—that seems to have a double meaning—it refers to the invoice price to the con-

signee and then proceeds 'at the place and time of shipment'—I think, of course, this evidence ought to be supplemented to show what the value was at the place and time of shipment—this has two meanings, and I don't know which is controlling—they are objecting to it because there is no evidence that the invoice price—I take it that is what is specified in the letter—was the value of the property at the time and place of shipment—if he knows, he may state that—that would obviate the objection.

Q. If you know, Mr. Begg, you may state the value of the property at the time and place of shipment—were you acquainted with the market values?

A. Yes sir, I was, but this car was sold on delivered basis to these people in Newark—unless we made or unless the car was delivered to them,—the sale was made on the basis of delivering the car.

Mr. Dick: I object to that answer—it is not responsive.

The Court: Yes—if he knows the value of this stuff at the time and place of shipment, that is what he was asked to state.

A. I can't tell it off handed—there was so much put in at different points that it would be a hard matter to determine or pro rate the cost at the shipping point.

Q. Do you know the fair market value of the car of poultry at the time of shipment, with the freight prepaid for shipment to New Jersey?

Mr. Whitnel: We object to that.

58 The Court: The bill of lading refers to the invoice price and the price in the letter meets that—then it again refers to the time and place of shipment—I don't know, but it seems to me it would be worth the invoice price—if it would be worth that at the time and place of shipment, that would almost necessarily follow, but they are making an objection here which I am trying to obviate so as to comply with the terms of that bill of lading.

Q. I will ask you, Mr. Begg, to state whether or not the value of this car was as invoiced—the value at the time and place of the shipment of the produce.

Mr. Dick: We object to that.

The Court: If this witness has an opinion as to the value of this property at the time and place of shipment, let him state it.

A. The poultry was worth just the price it was sold for, providing the freight charges were prepaid—the poultry was worth the price it was sold at, provided the Railroad Company delivered it.

Q. And the freight charges were prepaid?

A. The freight charges were prepaid, $190.40.

Q. I will ask you if you received the document which I hand you from the Chicago & Eastern Illinois Railroad Company.

A. Yes.

Mr. Gilbert: I wish to offer in evidence from the file just identified Paragraph 42 on Page 8 and Item 10 on Page 3.

Mr. Dick: We object to that—there is no way of telling from this document whether or not it was in force at that time—the right way to prove a tariff is to prove it under the certificate of the Interstate Commerce Commission.

Q. I will ask you, Mr. Begg, if you gave notice to the Railroad Company of this loss.
A. Yes.
Q. I will ask you to examine this paper.
A. This claim was made against them on July 21st and receipted by their agent.

Mr. Gilbert: We wish to offer the paper just identified by the witness.
Mr. Dick: We object to it as a self serving admission of plaintiff.

59 Cross-examination.

By Mr. Whitnel:

Q. Are you acquainted with the market value of a car of poultry at Cypress, Illinois, and Mount Vernon, Illinois, on the 21st day of March, 1913?

Mr. Gilbert: I object to that—that is no criterion for its valuation.
The Court: I don't know that it is—it is cross-examination, perhaps—he said the freight being paid on that car, it was worth at the time what it was sold for—that is common sense—still, he may answer that question.

A. It was worth twenty cents a pound.
Q. Hens were on that day at that place?
A. Loaded in the car with the freight prepaid.
Q. What was the market price paid at Mount Vernon and at Cypress on that day?

Mr. Gilbert: We object to that—that does not include the elements of handling and preparing for shipment.
The Court: It is perhaps cross-examination to show his knowledge of the business, but as I stated before, the witness stated, and I think that is a matter of inference, that the property, after they had sold it for what the letter stated and paid the freight on it, as they say they did, was worth at the time and place of shipment just what they sold it for—there isn't any question about that.

A. It was worth twenty cents loaded in the car.
Q. Was that being paid for hens at Cypress—was that the market price paid for fowls there at Cypress?
A. I don't think that enters into the case.
Q. Just answer the question.
A. I don't remember just what we paid at the time.
Q. Do you know at Mount Vernon on the 22nd of March?
A. I can't tell you positively—I would not want to make the assertion.

Q. Isn't it true that the market price at Mount Vernon on that day was twelve and one half cents a pound?
A. I don't remember.
Q. Do you know or do you recall that the market price at Cypress on the day in question was twelve and one half cents a pound?
A. I don't remember.

60 Redirect examination.

By Mr. Gilbert:

Q. I want you to state if this car of poultry was ever delivered to Barker & Company?
A. No sir.
Q. And it was never returned to you—to the Collins Produce Company?
A. No sir.

Recross-examination.

By Mr. Whitnel:

Q. Were you with the car when it was in transit?
A. No sir.
Q. Where were you at?
A. Mount Vernon.
Q. How do you know it was never delivered to them—mere hearsay?
A. I know I have never been paid for it—I know the car was not delivered.
Q. You don't know that of your own knowledge?
A. Yes sir, I know positively.
Q. How do you know that?
A. By correspondence with C. E. Barker and our New York house.
Q. After this car reached Mount Vernon on the 22nd of March, where did it go from that point?
A. From Mount Vernon to Salem.
Q. Over what road?
A. From Mount Vernon to Salem over the C. & E. I. and then on the B. & O.
Q. After it left the tracks of the Chicago & Eastern Illinois, it went over the tracks of the Baltimore & Ohio Southwestern from Salem to Vincennes?
A. Yes.

Mr. Dick: We object to the introduction of this tariff.
The Court: I don't see that the tariff has anything to do with it.
Mr. Whitnel: We object to the introduction of this letter of the Collins Produce Company—this letter that purports to be in the form of a claim.
The Court: This letter seems to be a summary of everything you have proved here by other witnesses in the case—in other words,

it is a letter or statement of claim addressed to the defendant—as I understand it, it comes within the class of self-serving documents and is wholly unnecessary, because if you have proved anything in this case by your witnesses, you have proved what is contained in that letter.

61

Mr. Gilbert: The bill of lading states that the claim must be filed in writing.

The Court: The bill of lading says "Claims must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, etc." I think he may prove it for that purpose—the contract calls for it—he may prove that he made a claim.

Mr. Dick: The defendant excepts to this ruling.

The document is admitted in evidence and marked plaintiff's Exhibit E' and read to the jury, in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT E.

Collins Produce Company,
Incorporated,
Wholesale Dealers in Poultry, Butter, Eggs, etc.

General Manager, J. Cyril Begg.

General Offices: Mt. Vernon, Ill.

Mount Vernon, Illinois,

July 21, 1913.

Claim of Collins Produce Company of Mount Vernon, Ill. against the C. & E. I. Railroad Company, Mr. W. C. Ellison, Agent, Mount Vernon, Illinois and William J. Jackson and Edwin W. Winter of the C. & E. I. Railroad Company as Receivers of the said Railroad Company.

GENTLEMEN: On March 21, 1913, the Collins Produce Company shipped from Cypress, Illinois, L. P. T. Car 739, consigned to C. E. Barker and Co., destination, Newark, New Jersey, containing live poultry as follows:

| | | | |
|---|---|---|---|
| Fowls | 19268# | at 20c— | $3,853.60 |
| Cocks | 1368 | 14c | 191.52 |
| Chickens | 1139 | 20c | 227.80 |
| Ducks | 273 | 22c | 60.06 |
| Geese | 206 | 14c | 28.84 |
| Turkeys | 227 | 20c | 45.40 |
| | | | $4,407.22 |

62 This car has not been delivered to Barker & Company and by agreement we were to deliver this poultry in Newark, New Jersey. The agreement in relation hereto with Barker & Company was on April 21, 1913, cancelled by Barker & Company on account of non-delivery.

We therefore make this claim for the value of such poultry, viz., $4,407.22, and respectfully request the prompt payment thereof.

Yours truly,

COLLINS PRODUCE COMPANY.
J. CYRIL BEGG, *Vice-Pres.*

Received of Collins Produce Company a copy of the above and foregoing claim this, the 21st day of July, 1913.

W. C. ELLISON,
*Agt. C. & E. I. R. R. Co. and as Agent of W. J. Jackson and E. W. Winter, as Receivers.*

Here the plaintiff rested its case.

And now comes the defendant, Chicago & Eastern Illinois Railroad Company, by Whitnel & Browning and Homer T. Dick, its attorneys, and at the close of the plaintiff's evidence in chief, moves the Court to exclude the evidence and direct a verdict in favor of the defendant, and in this behalf submits and requests the Court to charge the jury as follows:

The jury are charged to return the following verdict:

"We, the jury, find the defendant not guilty."

Refused.

But the Court denied the motion and refused to give the said charge to the jury.

(To which ruling of the court the defendant by its counsel then and there excepted.)

Now Be It Remembered that the defendant, to sustain the issues on its behalf, introduced the following evidence, that is to say:

Mr. Dick: Defendant offers in evidence certain portions of this classified tariff Number 39, which has been filed with the Interstate Commerce Commission by the defendant, with certificate signed by the Secretary of the Interstate Commerce Commission, George B. McGinty, and the seal of the commission showing that this circular was in effect on March 21st, 1913; on Page 1 of the classifica-
63 tion, we offer paragraphs A, B, C and D—on Page 24 we offer the printed bill of lading with the identical subject matter contained in the bill of lading heretofore offered in evidence by the plaintiff, and on Page 197, under the heading of 'Poultry,' that the minimum weight of carload shipments shall be 18,000 pounds, a man in charge carried free and no return free passage given.

Mr. Gilbert: We object to it.

The Court: I don't see how it is material in this case—they paid the freight—I don't see that this tariff schedule is material in this case—they couldn't change the law, even if they tried to change it—

so far as being limited to the weight given in the bill of lading that is a question of law—I don't think we will go into the history of this—you can't pick up a tariff and say 'You are bound by this and so are we' when nobody ever thought of it and nobody ever saw it—the Supreme Court has decided something that looks a good deal like that, but until I am compelled to follow it, I will not—the objection is sustained.

Mr. Whitnel: We now desire to read in evidence the following depositions.

The caption of the depositions is as follows:

*Stipulation.*

In the District Court of the United States, Eastern District of Illinois, March Term, A. D. 1914.

No. 915.

COLLINS PRODUCE CO.

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

It is hereby agreed by and between the plaintiff, Collins Produce Company, and the defendant Chicago & Eastern Illinois Railroad Company, that the depositions of Cyrus Meade, William C. Kneis, Frank Robinson, and of other witnesses on behalf of the plaintiff shall be taken in the above cause upon oral interrogatories before Edward E. Burkhart, a Notary Public, by a stenographer at his office at 504 Schwind Building, in the City of Dayton in the
64 County of Montgomery in the State of Ohio, commencing at nine o'clock A. M. Monday, April 27th, 1914; at which time and place it is agreed that the defendant may also take the depositions of witnesses in said cause in its behalf on oral interrogatories.

It being agreed and understood by the parties to this suit that all notices and all legal formalities as regards the taking of such depositions are hereby waived.

Dated this the 7th day of April, A. D. 1914.

G. GALE GILBERT,
*Attorney for Plaintiff.*
HOMER T. DICK,
*Attorney for Defendant.*

In the United States District Court for the Eastern District of Illinois.

THE COLLINS PRODUCE COMPANY, Plaintiff,

vs.

THE CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

*Depositions of Sundry Witnesses, on Behalf of Plaintiff and Defendant in the Above-entitled Cause, Taken Before Me, Edward E. Burkhart, a Notary Public Within and for the County of Montgomery and the State of Ohio, Pursuant to the Notice and Agreement Hereto Attached and at the Time and Place Therein Mentioned.*

Present:

On behalf of plaintiff: G. Gale Gilbert, Esq.
On behalf of defendant: Homer T. Dick, Mr. Fowler.

65 *Deposition of J. F. Robison.*

J. FRANK ROBISON, called on behalf of the plaintiff, being by me duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Examined by Mr. G. Gale Gilbert:

Q. 1. Where do you reside Mr. Robison, and what is your business?

A. I reside in Dayton, Ohio. I am now connected with the dairy and food department of the State of Ohio, as food and sanitary inspector.

Q. 2. If you have ever had any experience in handling live poultry I will ask you to state the extent and character of your experience?

A. Well, I have been interested more or less for the last twenty five or twenty six years in live poultry and produce.

Q. 3. What experience, if any, have you had in the shipping and transportation of live poultry by rail?

A. I shipped poultry from most all points in the United States to different markets; I have shipped to New York City, New Orleans and Chicago.

Q. 4. What experience, if any have you had in the produce business in New York City?

A. I was weighmaster in the West Washington Market, New York City, for eleven years.

Q. 5. In that position did you have an opportunity to judge of the length of time that live poultry could be cared for in poultry cars?

A. There and in shipment, yes sir.

Q. 6. I wish you would state fully what your observation and experience have taught you with reference to the handling and shipping of live poultry in poultry cars.

A. I am not able to state as to how long a carload of poultry could really be kept in the car; but I have known carloads of poultry to stand on the track in New York City or in the terminal yards of New York City for twenty one days, after being on the road for twelve days. How much longer they could have been held, I don't know. But they was in good condition at the time we unloaded the cars.

Q. 7. Where were you during the Dayton flood?

A. I was at my home during the Dayton flood until I had to get out. I was in Dayton.

Q. 8. I will ask you, Mr. Robison, if you saw the car of
66 poultry in question in this case, or a portion of it, which was confiscated or taken over by the military department here during the Dayton flood.

A. I did. I had a telegram from J. Walter Begg of Vincennes, Indiana, in charge of the Collins Company produce plant at that place, stating that he had a carload of poultry en route for New York, that was due in Dayton the day of the flood, asking me to investigate and give the man any assistance I possibly could who had charge of the car. That telegram was delivered to me by mail the following week, I think it was, on Monday or Tuesday probably, I couldn't tell you just exactly the dates. As soon as I got that telegram, why I started to hunt up the car, and in my investigation I was stopped three or four different times, and had to show the telegram to get through; and went to the C. H. & D. freight house here and inquired in reference to the car, and they told me they had the car or did have it, in North Dayton, up near the coal docks on the long siding, but that the car had been confiscated by the state. I followed on up the tracks and found the car and a man in charge by the name of Shipley, if I am not mistaken. Is that the right name, Shipley?

Q. 9. Yes.

A. I met him, and he told me that the car had been taken over by the authorities; that he was staying there with the car helping them to handle the car or unload it. They said they couldn't leave him go; had to have somebody to take care of the live poultry.

Q. 10. What condition did you find the poultry?

A. The part that was left was in very good condition. Probably anywhere from one third to one fourth of the car there when I got to the car, but the poultry was in very good condition.

Q. 11. What date was that?

A. I couldn't give you the dates. It must have been on or near the first of April. I couldn't give you the exact date, because we had anything else on hand besides dates at that time, around here.

Q. 12. Do you know anything about the market price of poultry at that time?

A. I don't remember the market price of poultry at that time, although I did at the time. They asked me to appear before I appeared there and I knew at that time the price of poultry, but
67 I supposed this case was settled, and it never entered my mind since then until I got subpœnaed here.

Q. 13. Do you recall whether the price of poultry advanced after that?

A. No, I do not. I know poultry was high at that time. I don't know—if I am not mistaken, it was either fourteen or sixteen cents, something like that, in New York.

Mr. Whitnel: There is an objection to that answer.

The Court: Unless the objections are renewed here, we don't care about them.

Q. 14. You think at that time you were familiar with the produce market in New York?

A. I was.

Q. 15. You have already given what you think the market price was?

A. Yes sir.

Q. 16. Do you remember whether during the few weeks that followed the flood here the price of poultry in general advanced noticeably?

A. Well, I couldn't say. No doubt it did. I couldn't say that it did.

Q. 17. The military authorities were in charge of the poultry before you received Mr. Begg's telegram?

A. Yes, they were in charge of the poultry when I got there; and I started to hunt the car as soon as I got word from there.

Q. 18. You observed that some two thirds or more of the poultry had been disposed of before you reached the car?

A. Yes sir.

Cross-examination.

By Mr. Dick:

Q. 19. Mr. Robison, the day of the height of the flood was Tuesday, the 25th of March, was it not?

A. Yes sir.

Q. 20. And it is a fact that you did not see this car at all until some time in the following week?

A. Yes sir.

Q. 21. You don't mean to testify how much poultry there had been in the car at the time it was taken over by the military authorities, do you?

A. No sir. I mean that there was from one third to one fourth of a carload of poultry, the minimum weight, that is allowed as the shipping weight of live poultry.

68 Q. 22. As I understand your testimony, what you mean to say is that when you found the car, there was then from one third to one fourth of a carload of poultry in it?

A. Yes sir, that is right—that is, if the car had been a full car. I don't know as to that. The minimum weight is eighteen thousand pounds live poultry, and from one third to one fourth that much poultry was in the car when I got there.

Q. 23. Then as you understand it, poultry shipped by the carload alive, fed by a man on the cars, is billed at the minimum weight of eighteen thousand pounds?

A. Yes sir. They pay for eighteen thousand pounds whether they have it or not. If they have got more than that, they pay the extra; if they have got less than that they pay for it anyhow.

Q. 24. What kind of a car was this that you found the poultry in?

A. This was an L. P. T.—Live Poultry Transportation Company's car.

Q. 25. Built and divided by screened partitions, for the special purpose of shipping poultry?

A. Yes sir.

Q. 26. When you were asked about the price of poultry in New York at that time, you don't want to be understood as having been in New York, then, do you?

A. No sir, but it has been my—well, I have been in the habit of looking over the poultry market most every day. If I pick up a paper, being in the poultry business so long, I always look at the quotation of the markets.

Q. 27. Then your information as to the condition of the New York market is based on what you saw in the newspapers about that time?

A. Yes sir.

Q. 28. You say you received a telegram from a Mr. Walter Begg of the Collins Produce Company at Vincennes, saying that he had this car of poultry that was due to pass through Dayton here the day of the flood?

A. I believe that is the name of the man that sent the telegram.

Q. 29. What he stated was of that purport?

A. Yes sir, that the car was due to be here that day if it made its running time. The shipper told me it arrived the night before the day of the flood.

Q. 30. By the shipper you mean——

A. The man in charge.

69 Q. 31. Mr. Shipley, the man in charge?

A. Yes sir.

Q. 32. You say this telegram was not delivered to you until the following week, and you then received it by mail?

A. Yes sir.

Q. 33. Do you know the cause of that delay?

A. The flood, yes sir.

Q. 34. How long have you lived in Dayton?

A. Well, it is a little more than three years now—close onto four years.

Q. 35. Are you a native of this part of the country?

A. Born and raised in Preble County, Ohio.

Q. 36. How far from Dayton is that?

A. About thirty five miles.

Q. 37. And what is your age?

A. I will be forty four years the coming October.

Q. 38. Have you been acquainted with Dayton and the surrounding country most of your life?

A. Well, I have in a way, yes. I know more about Dayton in the last three or four years than I ever knew; but I knew Dayton, where it was at, where it was situated; been here often times.

Q. 39. Isn't it a fact that this flood that came onto Dayton on the 25th of March, 1913, was the greatest flood ever known in the history of Dayton and this part of Ohio?

A. Well, no doubt it was. I am not able to say as to what it was here previously; but I know we had plenty the 25th.

Q. 40. Isn't it the greatest flood that you have known or heard of yourself in Dayton?

A. Well, it is the greatest one I have ever seen through here. I have seen the Johnstown flood.

Q. 41. The greatest in Dayton and vicinity?

A. Yes, the only one I have ever seen in Dayton.

Q. 42. Do you know about how deep the water got in the principal part of the city, or right here in this business center, in the vicinity of this Schwind Building, or the Algonquin Hotel?

A. Well, it was impossible for me to get down in this part of town, to tell the truth about it. All I could see was the water marks on the buildings.

Q. 43. Well, judging by the water marks you saw on the buildings the first time you were able to get downtown in Dayton after that high water, about how deep was it here in the business center?

70 A. I couldn't say as to how deep it was right here, but over at the New Court House, looking across at the marks, judging from that, I should judge anywhere from eight to ten feet.

Q. 44. Deep?

A. Yes sir.

Q. 45. Isn't it a fact, Mr. Robison, that that flood was accompanied by great loss of human life as well as loss of property?

Objected to on the ground that it is wholly irrelevant and beyond the examination in chief.

Mr. Gilbert: We renew the objection.

The Court: I understand there is no contention in the evidence so far that this property was destroyed by the flood—in fact, that witness said it was not—it is cross-examination, maybe.

A. Well, I couldn't say how much life was lost. I wasn't in position to know. I seen them take out some. No doubt there was a whole lot of property lost.

Q. 46. You spoke of appearing before the Red Cross in this case some time ago and having formed an impression that this matter was all over with.

A. No, I don't want you to infer that at all, because I, of course I naturally supposed that it would be settled easy. And I didn't want you to think I say it was settled, or anything of that kind. I don't know anything about it, any more than that I appeared before

them, something concerning the carload of poultry, the condition and so forth.

Q. 47. As you remember it, when was that hearing held?

A. That is a hard question to answer. It has been almost a year ago. It must have been in, though, possibly along in the latter part of June.

Q. 48. 1913?

A. Yes sir—that is just a rough estimate of it—I haven't got the date.

Q. 49. As you understand it, was that a hearing of the claim of the Collins Produce Company, the plaintiff here, to be paid for this identical carload of poultry, and heard before a board of Ohio state military officers?

A. Well now, I couldn't tell you whether it was United States military officers, or whether officers of the Red Cross Association—that is what they told me, the Red Cross Association would like to know the particulars in reference to that carload of poultry.

71 Whether they were the Red Cross Association of Ohio military authorities, or who they were, I am not able to say. I had no way of knowing, because I had no right to ask questions, or to ask them to show their authority.

Q. 50. But you were called as a witness at a hearing before some such Board along about last June?

A. Was called as a voluntary witness, yes sir.

Q. 51. And you then were called on behalf of these same people, the Collins Produce Company?

A. I couldn't tell you at the present time, nor I don't really know which one wanted me there; I don't know whether the Collins Produce Company wanted me there or not.

Q. 52. The Collins Produce Company, the State or the Red Cross?

A. Yes sir, I don't know which it was.

Q. 53. But you do know this, do you not, that the subject matter being inquired into at that hearing when you testified was this identical carload of poultry?

A. I know that that was in reference to it, yes, sir. I know the reason they called me was because I understood that line of business.

*Deposition of W. C. Nies.*

WILLIAM C. NIES, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Examined by G. Gale Gilbert:

Q. 1. You may state your name, age and place of residence.

A. William C. Nies; 21 Leonard Street now; age will be thirty-two in July.

Q. 2. Mr. Nies, I will ask you to state what was the date of the Dayton flood.

A. 25th of March in the year 1913.

Q. 3. Where were you living at that time?
A. Living on the C. H. & D. track up in Madriver Township.
Q. 4. How near to the place where this car of poultry was found on the morning of March 26th?
A. Why, I judge it to be about three or four squares below me.
Q. 5. What was your business at that time?
A. Who I was working for?
72 Q. 6. Yes.
A. Working for the Dayton Pitless Scale Company that time. I started to work that morning on account of the flood couldn't get there, and come back, and that car was in there; and I jumped or climbed on top of the car so I wouldn't get in the water, I could get through, and I seen Mr. Shipley there.
Q. 7. Mr. Shipley was the caretaker who accompanied this car of poultry, as you understood it, from Illinois?
A. Yes, sir.
Q. 8. Now, you were living out in the country north of Dayton?
A. Yes sir.
Q. 9. This car of poultry you first saw out on the siding of the C. H. & D. Railroad in the north part of Dayton?
A. Yes sir.
Q. 10. Mr. Shipley was at the car when you first saw the car of poultry?
A. Yes sir.
Q. 11. Now, did you become acquainted with Mr. Shipley at that time?
A. Yes sir.
Q. 12. There was no water in the car of poultry at that time?
A. No sir.
Q. 13. Was the flood at high water mark on the 25th?
A. Yes sir.
Q. 14. When was it at its highest?
A. On the 25th at night was the highest.
Q. 15. On the 25th?
A. Yes.
Q. 16. But the water reached its highest point about the 26th?
A. About the 26th.
Q. 17. Was there any water in this car of poultry from the flood water when you saw it?
A. No sir.
Q. 18. You may state whether or not any of the flood waters ever reached a height sufficient to get into this car of poultry?
A. No, not up there it wouldn't.
Q. 19. Do you know whether it did or did not?
A. No, I don't know that.
Q. 20. I will ask you whether any of that car of poultry was drowned?
73 A. No, none of them drowned.
Q. 21. Was not drowned?
A. No sir.
Q. 22. The water was up to the track, was it?

A. Yes sir.
Q. 23. But not in the car?
A. No sir.
Q. 24. How long until the water had receded from the track after the 26th?
A. It was about two days, I think—I judge it to be about two days until the water went down.
Q. 25. At the place where this car was standing on the 26th was the water up to the track?
A. Yes, was up to the track up there.
Q. 26. Did you wade through the water to reach the car?
A. No sir.
Q. 27. How did you reach the car?
A. By going right straight from my place I got over. There was no water, climbing on the car—climbed over the top of the cars over there.
Q. 28. The railroad track near your house was not inundated at all?
A. No.
Q. 29. And you got onto this car from the dry track?
A. Yes sir.
Q. 30. By walking over other cars?
A. Yes sir.
Q. 31. You said that none of this poultry was drowned by the flood?
A. Yes sir, wasn't any drowned by the flood.
Q. 32. You know that, do you?
A. Yes sir.
Q. 33. What, Mr. Nies, was the condition of this poultry?
A. In good condition.
Q. 34. Now, with whom did Mr. Shipley stay at night while he was here in Dayton with this car of poultry?
A. Stayed with me.
Q. 35. You may state whether or not you assisted Mr. Shipley in caring for this poultry the morning after you made his acquaintance?
A. I did.
Q. 36. In what way did you assist him?
A. In helping carrying feed, in helping feed and carrying water for the chickens. Had to carry water in a tub. I furnished
74 the tub and we carried the water; carried three hundred gallons of water a day—that is what I carried.
Q. 37. Where did you get your feed?
A. We had feed in the car yet on the first day; we had about five or six sacks in the car yet, I think. I know we had four. He had four of them down underneat- the platform. Then he had some up yet, shelled corn, cracked corn, and he had some chop—regular chop feed, I think it is.
Q. 38. Did the flood damage this feed in any way?
A. No sir.

Q. 39. Now at what other places did Mr. Shipley buy feed or obtain feed?

A. We obtained feed from Mr. Kammer.

Q. 40. Did he live near by?

A. Right across the road from the car.

Q. 41. Now you may state whether or not you and Mr. Shipley properly fed and watered this poultry from the morning of the 26th of March until it was taken over by the military?

A. Yes, sir, we took care of it—fed them twice a day.

Q. 42. The poultry was in a regular produce car?

A. Yes sir.

Q. 43. Built and constructed for the purpose of the transportation of live poultry?

A. Yes sir.

Q. 44. What did this shipment of poultry consist of?

A. Why it consisted of ducks, turkeys, guineas and chickens.

Q. 45. You may state whether or not it was a full car of poultry?

A. Full car of poultry.

Q. 46. How long did the car remain in North Dayton until it was taken over by the military?

A. Why, I judge it would be about six days.

Q. 47. And how long did the water remain about this car, on the ground below it?

A. About two days.

Q. 48. After two days what was the condition?

A. Why, in good condition.

Q. 49. The water had receded from the railroad tracks?

A. Yes, up there it did. Down below there was water yet.

Q. 50. Do you remember the day that the military took charge of the car of poultry?

A. I think it was on the 31st day of April, or of March, rather—31st day of March.

Q. 51. In what condition was this poultry at that time?

75 A. In good condition.

Q. 52. On the question of feed, you may state whether or not Mr. Shipley had plenty of feed or whether he did not?

A. He had plenty of feed. He could get more feed if he wanted it.

Q. 53. Was there any difficulty after the 31st of March about providing feed for this car of poultry?

A. There was; we had trouble getting it.

Q. 54. But you did provide it—he could provide it?

A. Yes sir.

Q. 55. All the feed that was necessary for them?

A. Yes sir, we could.

Q. 56. Did you have any place where this poultry could have been unloaded and cared for?

A. I did—I had a half acre up there that was all fenced in.

Q. 57. Suitable for enclosing poultry?

A. Enclosing poultry—had a good bit of wire on top of the hill over there.

Q. 58. How near was your lot from the point where this car was standing?

A. About three squares—three or four squares away from the car.

Q. 59. And you may state whether or not you and Mr. Shipley considered the housing and care of this poultry, if necessary, in your lot?

A. Yes sir.

Q. 60. Had arrangements been made to do so?

A. We said that we would if the state and military wouldn't take them.

Q. 61. That was the arrangement?

A. That was the arrangement, yes sir.

Q. 62. There had been talk at that time of the military confiscating the property out there?

A. Yes sir.

Q. 63. Did you hear any conversation between the representative of the C. H. & D. Railroad and Shipley with reference to this car of poultry?

Objected to unless the exact agent of the C. H. & D. Company is identified.

(Question is repeated by the stenographer.)

A. All that I heard was that the railroad man said, "You better let the state military take that car of chickens or they will die on your hands."

76 Q. 64. But they were not dying, were they?

A. No, sir, they was not dying. Well, we lost about twenty-one while we had them. They died faster after the state military took them.

Q. 65. They did not take the care of them that you did?

A. No, because we couldn't get the feed. Mr. Shipley didn't want to buy any more feed after the state took it, you know.

Q. 66. During the days from the 26th of March until the early part of April when the military took it over, only twenty one had died?

A. That is all we lost we figured that morning.

Q. 67. What was the name of this railroad man that requested Mr. Shipley to notify the militia to take the car?

Objected to as improper in form and substance and not a correct statement of the evidence.

A. Why, the way I understand, his name was Grove.

Q. 68. Where was that conversation?

A. Out close to the John Biersack siding—right in front of Biersack's place, up there on the C. H. & D. track.

Q. 69. About what date was that?

A. That was pretty hard for me to judge—I couldn't give you the date on that.

Q. 70. Was it between the 26th of March and the 1st of April?

A. Yes sir, I couldn't tell you just exactly what date.

Q. 71. Did you know this man Grove?
A. I did when I saw him.
Q. 72. Did you learn his name?
A. Yes sir.
Q. 73. What is his name, O. B. Grove?
A. I don't know just exactly whether O. B. Grove. I know he was on the road, worked on the road, taking care of the road for the C. H. & D.
Q. 74. What was he doing on this particular day?
A. Taking a walk up the track looking at the bridge, condition of the tracks and coal docks.
Q. 75. Was there in the service of the railroad that day?
A. Yes sir.
Q. 76. Can you give me the exact language, as nearly as you can, that was used by this man to Mr. Shipley?
A. No, I couldn't. All that I could give you was this, that he said that, "Better hand them over the car of poultry, over to the
77 state military," that they would die. That is all I could hear of it.
Q. 77. At that time the poultry was in what condition?
A. In the condition it was in good, condition until the state military took it.
Q. 78. But during the time that you and Mr. Shipley were in charge, you fed and watered the poultry regularly?
A. Yes sir we did.
Q. 79. And at night what was done with the car?
A. We locked the car and the state militia took charge—walked along there and watched it.
Q. 80. About what day was it that this car of poultry fell into the hands of the military?
A. Why, on the 31st of March, I should judge—about the 31st of March, 1913.
Q. 81. I will ask you, Mr. Nies, when Mr. Grove suggested that Mr. Shipley turn this car over to the military, whether or not Mr. Shipley didn't refuse to do it?
A. Well, he refused—yes, he refused—said that he would not give them until the State militia would show him a paper.
Q. 82. He was unwilling to turn them over?
A. He was unwilling to turn them over when the state military come here—when the state military come he said he wouldn't turn them over till the state military forced him.
Q. 83. Mr. Shipley's attitude was he wouldn't surrender control until forced to do so by higher authority?
A. By higher authority.
Q. 84. And did he remain in charge?
A. Until the car was unloaded.
Q. 85. Now did the military department require anything of you and Mr. Shipley after they took charge?
A. No.
Q. 86. Did they require you to do anything or order you to do anything?

A. Yes, ordered us to take care of them which we did as long as we had feed.

Q. 87. They did not provide you any feed?

A. They did not provide enough feed for us. They come, I judge, about two days before the car was—or the day that they come up there, with two cans of garbage or offals of the table to feed them chickens, which to a carload of chickens in there wouldn't amount to a row of pins.

Q. 88. Was that can of feed suitable for chickens?

A. No sir, it wasn't. I wouldn't have fed it to them, be-
78 cause it was more water than anything else—wasn't much to it.

Q. 89. From farmers back in the direction of North Dayton corn and feed of that kind could have been bought if they had attempted.

A. Yes sir, we could have got it.

Q. 90. That part of the country north of Dayton was not covered with flood?

A. No sir, only back water, but that was not up in the upland or heights or anything.

Q. 91. The country to the north was free from flood?

A. Yes sir. There was what we call a little bayou. Outside of that there was not a bit of water there.

Q. 92. Do you know the amount of feed that was purchased by Mr. Shipley?

A. I think there was about twenty-five bushels that he bought.

Q. 93. Who took the feed to the car?

A. Me and Mr. Shipley carried it.

Q. 94. After the second day of the flood wagons could drive to the car?

A. Yes sir.

Q. 95. What, if anything, was said to you by the farmers from whom you obtained this feed, as to whether you could have more feed?

A. He said we could get more if we needed it.

Q. 96. You may state, Mr. Nies, whether or not you could have obtained feed sufficient for those poultry until such time as the railroad could have moved the poultry?

A. We could.

Cross-examination.

By Mr. Dick:

Q. 1. Mr. Nies, the point at which this car of poultry stood on the tracks of the C. H. & D. Railroad in Dayton was a comparatively high part, wasn't it?

A. Yes sir.

Q. 2. Higher than it is downtown here in Dayton?

A. Yes sir.

Q. 3. Now about how far from the coal chute of the C. H. & D. Railroad in North Dayton did this car stand at the time of the highest flood?

A. I would judge it to be about half a mile from it, or a
79 quarter of a mile; but that is pretty hard to guess on the mile-age, you know.

Q. 4. Well, that would be in a southwardly direction?

A. Yes, southwardly.

Q. 5. Something like a quarter to half a mile?

A. Yes.

Q. 6. Do you know where Leo street is?

A. Yes sir.

Q. 7. Which way from that?

A. It lay south from the car.

Q. 8. Leo Street is *no* the south, towards town?

A. Yes sir.

Q. 9. Now you say on the morning of the 25th, was it, the big flood came to Dayton?

A. Yes sir.

Q. 10. You started to go to work and could not get there?

A. I started in the morning and could not get there, because I had to get to the shop. At that time I couldn't get there. Just went as far as the bridge; met my brother and he told me. So I come right up Leo Street, and the water was coming under the railroad from the other side, shooting underneath the track there.

Q. 11. And did you walk north up the track?

A. Yes, that is the only way I could get in there.

Q. 12. The water was every place else?

A. Yes. The only way I could get to my place, to get back north.

Q. 13. You speak of climbing up on top of the car.

A. After I was home, after I come home from work. That was in the afternoon.

Q. 14. It was on the afternoon of the 25th that you got up on top of the car?

A. Yes, sir, on the afternoon.

Q. 15. At that time was there any water over the ground and over the tracks at the place where this poultry car stood?

A. Well, it was just exactly at the top of the track—the water shooting down along the track, you know.

Q. 16. About as high as the top of the rails?

A. About the top of the rails, yes.

Q. 17. And it got higher that night, did it, the 26th?

A. Yes sir.

Q. 18. You spoke of some feed being on shelves under the car?

A. Yes sir.

80 Q. 19. The water got to that, didn't it?

A. No sir.

Q. 20. Didn't get to that?

A. No sir, didn't get there.

Q. 21. Wasn't any feed that was damaged by the water?

A. No sir—no feed that was damaged by water at all.

Q. 22. You spoke of a man by the name of Groves working for the railroad?

A. Yes sir.

Q. 23. Do you know him personally?
A. No, I did not.
Q. 24. All you know about him or his business is what you were told by others?
A. Yes sir.
Q. 25. And you have no personal knowledge of what his position was, if any?
A. No sir.
Q. 26. Or what his employment was?
A. No sir.
Q. 27. Was you present yourself when this man said to be Mr. Groves had this talk with Mr. Shipley?
A. Yes, I was right there.
Q. 28. Right with Mr. Shipley?
A. Right with Mr. Shipley.
Q. 29. Was there anybody else there?
A. Why no, I don't think there was.
Q. 30. Mr. Biersack was not there?
A. Not as I know of—I couldn't judge that fact—I couldn't say whether he was or not.
Q. 31. You say that all the chickens that died before the military took charge of this car was twenty one?
A. Yes sir.
Q. 32. You are sure of that?
A. Yes sir, as far as I know.
Q. 33. As far as you know?
A. Yes sir. I don't know what died before it come here.
Q. 34. But you mean to be understood that you were with this car all the time from the time the high water struck Dayton?
A. From the 26th to April 5th was with the car.
Q. 35. You were?
A. Yes sir.
81 Q. 36. Isn't it a fact that the section foreman buried large quantities of those chickens?
A. No sir.
Q. 37. You are sure of that?
A. No sir—not before the state militia took them.
Q. 38. When was it a number of chickens were burned up there with some coal?
A. When they burned coal?
Q. 39. Yes.
A. Wasn't none of them burned.
Q. 40. Weren't any chickens burned up when they burned some coal?
A. No sir, none that I know of.
Q. 41. None buried at any time?
A. No sir, not while we had it, till the state military took it—then we buried them, yes sir.
Q. 42. There were none of them burned at any time?
A. No sir, not as I know of—none burned.

Q. 43. There was other perishable live stock taken by the military in that vicinity?
A. Yes sir.

Objected to.

Q. 44. Do you remember some carloads of hogs on that track?

Objected to.

A. Yes sir.
Q. 45. The military took those, did they?

Objected to.

A. Yes sir.
Q. 46. Mr. Gilbert has asked you something about the supply of grain and feed. Isn't it a fact, Mr. Nies, that from the time the military authorities, soldiers of the Ohio National Guard, came to Dayton, the day after the high water came to town, that they took charge of all supplies of food?

Objected to.

A. No, they didn't supply us with any food.
Q. 47. I am not asking you that, but if they didn't take possession of the distribution of all food, no matter who had it?
A. Those he gave to, but we couldn't get any after they seized the car then.
Q. 48. Beverstock was a Lieutenant of the Ohio National Guard, wasn't he?
A. Yes sir.
82 Q. 49. He was one of the officers who had charge over that way?
A. Yes sir.
Q. 50. Well, now, Mr. Nies, isn't it a fact that from the time the soldiers came to Dayton, that they took charge of all sources of supplies of food and that neither the citizens nor any one else could buy anything without the approval of the military authorities?

Objected to.

A. Yes sir.
Q. 51. How soon after the high water struck Dayton on the 25th of March, 1913, did the Ohio military authorities take charge of the situation here in Dayton?
A. They got in here at three o'clock that afternoon; didn't take charge of it until the next day.

Objected to.

Q. 52. Took charge of it the 26th of March?

Objected to.

A. The 26th of March took charge of everything.

Q. 53. How early in the day of the 26th did they assume entire charge of Dayton and vicinity?

Objected to.

A. The next morning.

Q. 54. It is a fact, isn't it, Mr. Nies, that some of the railroad bridges were washed out and the railroad tracks covered with debris of all sorts?

A. Yes sir.

Objected to.

Q. 55. Buildings washed down and broken up and dead horses?

A. Yes sir.

Q. 56. And all sorts of material of that sort?

Objected to.

A. Yes sir.

Q. 57. Wasn't that true, Mr. Nies, not only of the Cincinnati, Hamilton & Dayton Railroad, but the Big Four and the Pennsylvania?

Objected to.

Mr. Gilbert: We renew our objection to all this line of testimony.

The Court: So far as this testimony goes, none of them have stated that the property was destroyed by the flood, but that it was taken by the military authorities—now all of this testimony along that line is merely cumulative and I don't suppose it is
83 disputed—I don't know whether they have any witnesses who will testify that the flood destroyed the property or not, but if they have, I think they should produce them—there is no need of accumulating a great volume of testimony when there is no dispute about it.

Mr. Dick: Our theory in showing the magnitude of the flood is to show why transportation was stopped and rendered impossible.

The Court: I understand that, but I don't understand where the Interstate law changes the common law rule that a common carrier is only released by an act of God or the public enemy—there is no evidence of that kind yet.

A. Yes sir.

Q. 58. And were not all those big railroads running through Dayton stopped by the flood?

Objected to.

A. Yes. I don't know down below or anything above—I only know didn't have much to do when the water went down. After I got up there I had to stay right there.

Q. 59. The Big Four Railroad going from Dayton to Columbus goes out through that same part of Dayton, doesn't it?

Objected to.

A. Well, it goes east.

Q. 60. Well, you know it wasn't running any trains during the flood, don't you?

Objected to.

A. Of course I don't know nothing about that. I couldn't give you my answer on that.

Q. 61. You know all trains were stopped on the Cincinnati, Hamilton and Dayton?

A. Yes, I know down below they were blocked, down towards Cincinnati.

Q. 62. You know that the bridges of the railroads across the Miami River, those here in Dayton like the Pennsylvania Bridge, were blocked—out of commission for some days?

Objected to.

A. Of course I didn't know nothing about from here, the Pennsylvania line, because I have never been out of the city; not been anywhere in my life—I don't know where the bridges are or anything else, and I am thirty-two years old.

Q. 63. Never travelled out of the city of Dayton in your life?

84 A. No sir, been right in Dayton thirty two years. I got a whole lot to learn yet.

Q. 64. Have you always lived up in that neighborhood of North Dayton?

A. No sir, been living in North Dayton for the last eight years. I lived up there about two years and about six up above there.

Q. 65. Where did you live before that?

A. I lived *on* 21 Leonard Street with my mother in law part of the time.

Q. 66. What part of the city is that in?

A. North Dayton—you mean before the eight years?

Q. 67. Yes.

A. Lived with my parents at 66 La Belle Street. That is over in the south end. Been living over here since I have been married.

Q. 68. Is this La Belle Street in the southern part of Dayton?

A. Yes sir, in the southern part of Dayton?

Q. 69. Was that washed out by the flood?

A. No sir. Whenever that is washed out the whole city is lost.

Q. 70. The second day of the flood, that is the 26th, you couldn't get to this car with a wagon, could you, on account of the water?

A. No you couldn't, not on the second day—I don't think you could that time.

Q. 71. So it wasn't until after the second day that you could drive there with a wagon?

A. No sir.

Q. 72. Was there any water to use for giving to these fowls to drink?

A. Yes sir.

Q. 73. Where did you get that?

A. Part of it at my place, and then went up to the Lithuainain's up there—went up there and got water.

Q. 74. Were you there with the car at the time the switch engine of the Cincinnati, Hamilton and Dayton, in charge of the regular crew, came there to move the car, and the soldiers of the Ohio National Guard would not permit them to move it?

A. No, I wasn't there then, not at that time.

Q. 75. Have you ever made any statement, Mr. Nies, that you did not commence to assist Mr. Shipley until the water went down on the Thirsday morning after the highest flood?

A. Yes sir.

Q. 76. That is true, is it?

A. Yes sir, I didn't help him until the water went down.

Q. 77. Not until Thursday morning?

A. Thursday morning.

Q. 78. Isn't it a fact that on Friday the military authorities took charge in this way, that they would not let anybody—they let you and Mr. Shipley take care of the car?

A. Yes sir.

Q. 79. But they would not allow any of the poultry to be moved or any disposition made of it after that?

Objected to.

A. Of course I don't know nothing about that, whether the State refused them to move the car or not. I don't know nothing about that.

Q. 80. When was it that you talked about putting the poultry in the enclosed yard at your place?

A. That was before the State took it.

Q. 81. But they would not let you take it out of the car, would they?

A. No, they wouldn't let us take them out, no. I told them about putting them in the yard, you know.

Objected to.

Q. 82. What day was that?

Objected to.

A. I don't remember—I couldn't give you the date on that.

Q. 83. But you know that was before they took possession of those things in the city?

Objected to.

A. Yes sir.

Q. 84. And after this Lieutenant Beverstock took charge they were distributing to the people who were in need of food were they not?

Objected to.

A. Well, the first load went to the state military. Mr. Biersack

hauled them. I couldn't tell you how many went, because we didn't keep track of them.

Q. 85. What did they do with them after that?

A. They killed them. They had them for their own use up there; but they of course took them down to Leo Street after the water got down so that they could switch them down. They started distributing them to each one at the car; one where they
86 had four in the family or eight got two, and all that.

Objected to.

Q. 86. Mr. Biersack drove a wagon?

Objected to.

A. Yes sir.

Q. 87. Then later, after they got some of the obstructions cleared from the track, the engine hauled them down to Leo Street?

Objected to.

A. Yes.

Q. 88. But the poultry was given to families after that, of course, from the Red Cross?

Objected to.

A. I couldn't say whether the Red Cross or not.

Q. 89. But you do know they presented tickets to the military in charge?

A. Yes sir.

Q. 90. And got chickens?

Objected to.

A. Yes sir.

Q. 91. One of the contents of that car was chickens, was it not?

A. Yes sir, most of it was, yes sir.

Q. 92. And some ducks and turkeys?

A. Yes sir.

Q. 93. Were you called to testify for this plaintiff at the hearing before the Board concerning this identical car last summer?

Objected to as beyond the examination in chief and irrelevant.

A. Yes sir.

Q. 94. Who came to see you, if anyone, about giving that testimony?

Objected to.

A. Shipley came up to the house after me.

Q. 95. Was anybody else here representing the Collins Produce Company at that time?

Objected to.

A. Mr. Begg himself was?
Q. 96. Mr. Begg was?
A. Yes.
Q. 97. Did you have any conversation with him?
A. The night before that. I never met the man before.
87 Q. 98. While he was here did you have conversation with him?

Objected to.

A. Well, the night before. Well, I have talked with him, but then he didn't ask me very much; only asked me whether I was in the car and all that; I told him yes.

"All that" objected to.

Q. 99. Were you ever given anything by the plaintiff in this case for your services?
A. No sir.
Q. 100. To refresh your recollection, isn't it a fact that Mr. Shipley gave you several dozen eggs?

Objected to.

A. Certainly I got eggs—we was in need, too.
Q. 101. Was anything said to you by Mr. Begg or Mr. Shipley in the way of promising you a position with that Company?

Objected to.

A. He didn't promise me. I asked him whether he had a job open. He said if he did he should let me know—that is all.
Q. 102. What did he say?

Objected to.

A. He said he would let me know.
Q. 103. To refresh your recollection, did not Mr. Begg go a little further than that and say to you that he would place you on the road for the firm the first opening he had?
A. Yes, sir.
Q. 104. And weren't you paid for your loss of time at the time that you were called to testify before this Board that had the hearing last summer?

Objected to.

Q. 105. And wasn't it about the time of that hearing that you had this conversation with Mr. Begg in the course of which he said that if they had a vacancy he would place you on the road for the firm?

Objected to.

A. No sir.
Q. 106. When was that you had that conversation?

Objected to.

A. That was a good while afterwards—about two or three months afterwards I wrote him a letter asking him for a job.

Q. 107. Isn't it a fact that Mr. Begg first wrote you that he might want you as a witness in this lawsuit?

Objected to.

88 A. Yes, that was after the hearing we had with the Ohio guard.

Q. 108. It was after that that you applied for a position in the employ of this Collins Company?

A. Yes sir.

Q. 109. Mr. Nies, you recognize Mr. Fowler, this young man sitting here beside me, do you?

A. Yes sir.

Q. 110. And when he was here in Dayton investigating this case on behalf of the defendant, did he call on you and ask you what you knew about this affair?

A. Yes sir.

Q. 111. Did he reduce it to writing and you sign it?

A. Yes.

Q. 112. I will hand you a statement which I will ask the reporter to mark for identification "Defendant's Exhibit 1" and ask you to examine your signature on it and on each page, the statement consisting of three pages and ask you if that is not your signature?

Objected to.

A. Yes sir.

Mr. Dick: The defendant will now offer and ask the reporter to attach the statement thus identified to the deposition of this witness, to be transmitted with it to the Clerk of the United States District Court for the Eastern District of Illinois.

Objected to.

Said statement was marked Defendant's Exhibit 1 and is hereto attached and made a part of the testimony of this witness.

Redirect examination.

By Mr. Gilbert:

Q. 1. I will ask you, Mr. Nies, in whose handwriting that statement was that has been referred to?

A. That is who wrote it?

Q. 2. Yes.

A. Mr. Fowler, there.

Q. 3. Who is Mr. Fowler?

A. A Chicago and Eastern railroad man—that is what he told me he was at the time

Q. 4. This statement in here—"A yard engine came after the car just as soon as they could get through after the flood, but military officers who were in charge of the car would not let them take

89 it until they brought an officer along, which they later did and the car was taken to the crossing at Leo Street, where it was unloaded by the soldiers and distributed to the people. I do not know what the railroad people wanted to do with the car when they first sent the yard engine after it"—now when was this that the engine came up there if you know anything about it?

A. Why, not exactly—no, I don't. I was at home, I think, at the time when they came—it was in the evening.

Q. 5. Was that statement that I read you made from what you heard?

A. Yes sir.

Q. 6. It was not made from any personal knowledge that you had?

A. No sir—you mean that there?

Q. 7. Yes.

A. No.

Q. 8. That was what you had heard?

A. Yes, that was all I heard.

Q. 9. You know nothing of your personal knowledge as to that point?

A. No sir, I don't.

Q. 10. Did you receive any compensation for services in taking care of this poultry crom the Collins Produce Company or Mr. Shipley, other than the eggs you spoke of?

A. No—I got a couple of chickens from the state military after they took it.

Q. 11. But you received no money from Mr. Shipley or the Collins Produce Company for your services?

A. No—the only charge that I made was that he paid for his board.

Q. 12. Mr. Shipley paid you for his board?

A. Yes sir.

Q. 13. You are not now in the employ of the Collins Produce Company?

A. No sir.

Q. 14. You have no interest in this case?

A. Interest in this case?

Q. 15. No interest in the result of the case?

A. No, I have no interest in it.

Q. 16. This paragraph in the statement, "After the military authorities took charge of the car and also before Mr. Shipley and I asked for permission to unload the car and let the chickens
90 run loose in my yard, but they would not let us do so. Where the car first sat, and so forth"—Now, in regard to this permission to unload the poultry, did you make that statement from personal knowledge, or from information you received?

A. From information I received.

Q. 17. Information you received?

A. Yes sir.

Q. 18. This statement here that you had signed for Mr. Fowler, you did not make that altogether from personal knowledge?

A. No sir.

Q. 19. Partly based on personal knowledge and partly based on information that you had received from others—is that correct?

A. Yes sir.

Q. 20. Was you there when the switch engine moved this car?

A. No sir, I wasn't. I was home, I think, eating supper, when they moved it.

Q. 21. Have you been promised anything for your testimony in this case by anybody?

A. No sir.

Q. 22. Anybody attempted to influence your testimony, either one way or the other, in the case?

A. No sir, only that man there came up; he is the only one come up.

Q. 23. He is the only man that came up?

A. Yes sir, to get the information, to get a statement of it—that is all—he is the only man that ever been there.

Q. 24. He didn't offer anything to you for your testimony?

A. No sir.

Q. 25. Mr. Begg has never offered you anything?

A. No sir.

Q. 26. And nobody else?

A. No sir.

Q. 27. The statement you have made here is without pay and reward and without any promise of pay?

A. Yes. I ain't figuring on anything, any money out of it at all. I like to see a man get justice. I am an honest man and always will be honest and make an honest living.

Q. 28. Is there any foundation whatever, Mr. Nies, in the intimation of counsel here that you have been influenced to testify
91 here untruthfully by the Collins Produce Company or some of their employes.

A. No sir.

Q. 29. Now you were asked if on the 26th of March the military took charge of some food supplies in Dayton. I want to ask you, Mr. Nies, if after the 26th of March, if you and Mr. Shipley did not get food for these chickens north of Dayton from a farmer?

A. That was Mr. Kammer we got corn from.

Q. 30. That was after this supposed military rule?

A. In between the 26th and the 31st that we bought corn.

Q. 31. But you did get feed after the 26th?

A. We got feed, yes.

Q. 32. And were told that you could have more if you needed it?

A. Yes sir.

Q. 33. And you did not obtain or didn't have to have any military consent to get it?

A. No, sir.

Q. 34. That was not in Dayton, that was outside of Dayton?

A. That was outside—that was in Madriver Township.

Q. 35. It was in Madriver Township?

A. It was in Madriver Township.

Q. 36. Ooutside of the city limits?

A. Yes sir.
Q. 37. This car of poultry was outside of the city limits, was it not?
A. Yes sir.
Q. 38. On the side track in Madriver Township?
A. Yes sir.
Q. 39. Out in the country?
A. Yes sir.
Q. 40. The feed that you got was from the country?
A. Yes sir, it was in the country.

Recross-examination.

By Mr. Dick:

Q. 1. Let me ask you this—how far from the Dayton City passenger depot is it out there to the coal chute at North Dayton where this car of poultry was at the time of the flood?
A. I couldn't tell you that.
92 Q. 2. Don't you know about how far it is?
A. No, I couldn't give you any statement on that. I am a poor man to figure on miles.
Q. 3. Didn't you ever walk it?
A. I have.
Q. 4. A great many times?
A. Yes sir, I have.
Q. 5. Do the street cars run out to that part of town?
A. Yes sir, run on Leo Street. The Leo Street cars run out there.
Q. 6. It is not more than two or three miles, is it?
A. From the Union Depot out there?
Q. 7. Yes.
A. Well, I would judge about three or three and a half miles, something like that. I would be a poor judge, I guess.
Q. 8. The soldiers were in charge out there at the time of this flood?
A. After the flood.
Q. 9. Isn't it a fact that that was one of the military zones and that there was a colonel and regular officers in charge of that district?
A. Yes sir.

At this point counsel for plaintiff, G. Gale Gilbert, Esq., stated that he did not desire to call any more witnesses, and thereupon Homer T. Dick, Esq., announced that he desired to take some testimony on behalf of the defendant, and thereupon called and examined the following witnesses.
Mr. Dick reads the following depositions:

*Deposition of C. O. Cusick.*

CHARLES O. CUSICK, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name and place of residence, Mr. Cusick?

A. Yes, Charles O. Cusick; my residence, Lima, Ohio.

Q. 2. What is your business?

A. I am a conductor by occupation, on the C. H. & D. Railway.

93 Q. 3. And were you employed as conductor on that railroad at the time of the Dayton flood in March, 1913?

A. Yes sir.

Q. 4. And what run were you on at that time—between what points?

A. On a manifest run between Cincinnati and Lima.

Q. 5. Is that what is sometimes called a fast freight run?

A. Manifest is fast freight.

Q. 6. Between Cincinnati and Lima?

A. Yes sir.

Q. 7. I will ask you if that run passed through Dayton?

A. Yes sir.

Q. 8. If you had charge of a train leaving Cincinnati the evening of March 24th, 1913, what train was it?

A. First 94?

Q. 9. First 94?

A. Yes sir.

Q. 10. I will ask you if you had in that train a carload of poultry en route from Illinois to Newark, New Jersey, in Car number L. P. T. 739?

A. Well, I had a car of poultry in my train, and I have my train book to show the number.

Q. 11. Is that a record that you made yourself?

A. That is all the record I keep.

Q. 12. Is it in your handwriting?

A. Yes sir.

Q. 13. Was it made at the time?

A. It was made at the time of leaving, yes sir.

Q. 14. And does it consist of the numbers and initials of the cars, places they were destined, and so forth?

A. Yes sir, to our junction points.

Q. 15. Did you see that car yourself?

A. Yes sir.

Q. 16. If you have the train book with you, I wish you would examine it and see if you had that car in your train, and its number.

A. My train book shows——

Mr. Gilbert: I object to what the train book shows—I have no objection to his refreshing his memory.

Q. 17. Well, after looking at your book, tell us, if you can, the number and description of that car, what it had in it, and so forth.

A. Well, sir, it is L. P. T. car, Poultry car 739 for Leipsic Junction, loaded with live po-ltry.

94 Q. 18. Where did you get that car?

A. Cincinnati, Ohio.

Q. 19. And how far did you take it to.

A. To North Dayton.

Q. 20. Now this Leipsic Junction was as far as would go on the Cincinnati, Hamilton & Dayton Railroad, is it?

A. Yes sir, north of Lima, Ohio, I think about twenty miles. I am not acquainted with the north end any more than I know it is north of there some place between twenty and thirty miles.

Q. 21. Isn't that where the Cincinnati, Hamilton & Dayton crosses what is called the Nickel Plate, a line to the east?

A. Yes, N. Y. C. & St. Louis.

Q. 22. About what time did you leave Cincinnati going north with that train that evening, the 24th of March?

A. Well, our train is scheduled out of there at 5:30, but aim to leave there probably between 5:30 and 5:45, something like that.

Q. 23. About what time did that train arrive at Dayton?

A. Well, it arrived somewheres along about between 1 and 1:30 A. M.

Q. 24. Was that the morning of the 25th?

A. Yes sir.

Q. 25. What if anything, stopped the further progress of that train, from going on to Lima as you had intended?

Objected to.

A. Well, the water stopped us.

Q. 26. Stopped by the flood?

Objected to.

A. Yes. I can say that I was notified to stop at the time here, and the water would have stopped me if I had run into it—headed into it some place.

Q. 27. At the time that you left Cincinnati with that train, I will ask you, Mr. Cusick, if the Cincinnati, Hamilton and Dayton Railroad was then being operated as usual?

A. Yes sir.

Q. 28. And after you got to Dayton, tell us what you saw yourself as to what happened?

Objected to, unless it was in reference to the poultry.

A. Well, all I saw was water.

Q. 29. Was there very much of it?

A. Well, I say this much—when I backed my train in at North Dayton on Track Number 1, that the water was falling so fast that it was impossible for an engineman or engineer to see a signal

95 over a car length and a half or two car lengths. The water was coming down in sheets.

Objected to and it is moved to rule out the answer of the witness.

A. All we saw was water from that until the 30th.

Q. 30. How long were you personally kept in Dayton after arriving with this train?

A. From between 1:00 and 1:30 on the morning of the 25th until the 30th. I waded water up to my knees in order to get out.

Question and answer are objected to.

Mr. Gilchrist: I renew my objection to this.

The Court: I don't think it is material or necessary to take up time with that.

Mr. Whitnel: If it will be admitted in this record that the flood itself was an act of God——

The Court: You don't need to prove that—you proved the flood and of course it was an act of God, but the point is, what did the flood do to you—what did it do to the chickens?

Mr. Dick: The point also is, what did it do to our railroad? We expect to show that it delayed transportation until days after the chickens had been taken by the military authorities—that the railroad was entirely out of operation until after that time.

The Court: I think you both agree that the flood did not destroy the chickens, but that the military authorities confiscated them and distributed them to the public.

Mr. Whitnel: Our position is simply this—after the Governor proclaim- martial law, we no longer held it as a carrier.

Mr. Gilbert: It is agreed that the Governor of Ohio proclaimed martial law in that county and sent the militia there and when they came there they took possession of the civil authority.

The Court: I understand you both agree about that—you may proceed.

Q. 31. How did you get out of town, in what direction, then?

A. Well, we came down here and crossed over into Riverdale and went around some way, I don't know how. I am not acquainted with the town. All I know is that when I start from one side I am hoping that I get to the next side without any trouble.

96 Q. 32. Did you observe what effect, if any, the water had on the principal business part of the town in Dayton; whether or not it was flooded?

Objected to as wholly immaterial.

A. Well, the town was torn up very badly from the effect of it.

Q. 33. Were the railroad tracks covered with water many places?

Objected to.

A. They were.

Q. 34. Were any trains run through Dayton on the Cincinnati, Hamilton and Dayton Railroad from the time you arrived with First 94 on the morning of the 25th of March, 1913, for several days?

Objected to.

Q. 35. How long have you been in the employ of the Cincinnati, Hamilton and Dayton Railroad, Mr. Cusick?

A. Since 1902.

Q. 36. And had you passed through Dayton most of the time you were working for the Company?

A. Yes sir, I have.

Q. 37. Did you ever, in all the years that you worked for the Cincinnati, Hamilton & Dayton Railroad before this flood, ever know of so great a flood in this locality?

Objected to.

A. No sir.

Q. 38. And I will ask you whether or not, if you remember, the tracks in North Dayton where you left your train on this occasion, were any higher or lower, than in the country that the railroad passes through north and south of there.

Objected to.

A. The tracks up there are higher than in the southern portion of the city—that is what we call the southern part. North and south are known with us. The tracks over there are higher than they are in the southern part.

Q. 39. And how is it when you go further north than that, on your way towards Lima?

A. The tracks then are considerably lower and follow the river possibly twenty miles.

Q. 40. Do you know what river it is the valley of which the Cincinnati, Hamilton and Dayton Railroad follows from Hamilton, through Dayton, and up past Troy and Piqua towards Sidney?

97 Objected to.

A. It is known to the railroad men as the Big Miami River.

Q. 41. And is that one of the streams which was very high during this great flood of March, 1913?

Objected to.

A. Yes sir.

Cross-examination.

By Mr. Gilbert:

Q. 1. How long did you state that you had been running through Dayton, Ohio, on the C. H. & D. Railroad?

A. Since 1902.

Q. 2. And how far beyond, either to the north or east or west?

A. We run north seventy one miles and south fifty two miles.

Q. 3. What other railroads beside the C. H. & D. run through Dayton?

A. Well, I know that the Pennsylvania or part of the Pennsylvania does, but other than that, I can't answer.

Q. 4. What about the Big Four?

A. Outside of the Big Four.

Q. 5. You only know of the Big Four and Pennsylvania?

A. Yes sir.

Q. 6. Dayton only has three railroads run through it?

A. Well, now that is a question that I can't answer, as far as their running through I don't know. We are employed on the C. H. & D. and we don't know anything about these other roads whatever. Now, the C. H. & D. has a couple of other smaller lines entering the city here and running to here, but we don't know where they go to.

Q. 7. But they run through here?

A. As far as I know, yes.

Q. 8. You say as far as you know. You do know what railroads there are in Dayton, don't you?

A. Well, now, I possibly could name them all and maybe not.

Q. 9. Please name as many as you can.

A. There is the Pennsylvania, the Big Four and the C. H. & D. are the only ones that I know of running through Dayton.

Q. 10. When you left this car of poultry in North Dayton was there any water in the car?

98 A. No sir, unless it run in from the rain.

Q. 11. I mean high water?

A. No sir.

Q. 12. You left it on high, dry land at that time?

A. Yes sir.

Q. 13. If any of that poultry ever drowned you don't know it?

A. No sir, I don't.

Q. 14. Do you know what became of that car from personal knowledge after you left it on the track of the C. H. & D. Railroad in North Dayton, on the night of, or morning of March 25th?

A. No sir, I do not. The nearest I was to that car must have been three miles. I didn't get back here till it must have been the 10th of April.

Q. 15. You answered Mr. Dick that for several days the Railroad Company was entirely stopped at Dayton. How many days did that last?

A. I don't think I answered that question.

Mr. Dick: I think he is right—several days was as near as we got to it.

(Question repeated by the stenographer.)

A. Now gentlemen, I don't think I answered that question.

Q. 16. Did you answer Mr. Dick that the railroad was stopped moving for a few days?

A. Yes, I know they were.

Q. 17. Did you answer Mr. Dick that?

A. Did I answer it?

Q. 18. Yes.

A. Not that I know of—if I did it is down there.

Q. 19. Now, how many days was that?

A. Well, sir, I was here five days and after I got out I didn't get back any more until about five to ten days, before I got back, anywhere near Dayton. What they done or what they did in that time I don't know. It didn't concern me. I got away and was glad I did.

Q. 20. What do you mean, then, when you say a few days?

A. Well, a few days is anywhere from one to ten days with me.

Q. 21. You don't know whether it was five or six or seven or eight days?

A. No sir, I don't. I know there was five days anyway.

Q. 22. You are sure it was as much as five days?

99 A. Yes I know that.

Q. 23. You are now in the employ of the C. H. & D. Railroad Company as conductor on freight trains?

A. Yes sir.

Q. 24. When was it you say you came to Dayton after the flood?

A. I don't know just exactly—I wouldn't say.

Q. 25. How did you come when you did come?

A. I came up the C. H. & D.

Q. 26. The railroad?

A. Yes sir.

Q. 27. As conductor?

A. No sir.

Q. 28. How did you come?

A. As a citizen.

Q. 29. How soon did you leave Dayton after you came in on the 24th?

A. In about five days. Come on the 25th; left here along about the 30th.

Q. 30. Was your run between Cincinnati to Dayton or Cincinnati and Lima?

A. Cincinnati and Lima.

Q. 31. And Lima is north of Dayton?

A. Yes sir, seventy one miles.

*Deposition of L. E. Smith.*

LEON E. SMITH, being duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name, please?

A. Leon E. Smith.

Q. 2. Where do you live?

A. 729 Troy Street.

Q. 3. In the City of Dayton, Ohio?

A. Yes.

Q. 4. And did you live here at the time of the great flood in March, 1913?

A. Yes, same place.

Q. 5. What connection, if any, have you or did you have at
100 that time with the military department of the State or the Ohio National Guard?

A. I was a major in the Third Ohio Infantry.

Q. 6. And were you here in the City of Dayton at the time that that great flood came to Dayton?

A. Yes sir, was at my home.

Q. 7. What is your business as civilian, outside of your military connection, Major?

A. Teller at the Merchants' National Bank.

Q. 8. In this city?

A. Yes sir.

Q 9. Do you remember what day it was that the flood came into the city?

A. It was on Tuesday, March 25th, I believe is the date.

Q. 10. And what was the effect on Dayton and vicinity?

Objected to.

A. Well, business was paralyzed, if that is what you mean, its effect on business.

Objected to.

Q. 11. Could you tell us about how high the water got in the business part of town?

Objected to.

Mr. Gilbert: We renew our objection.

The Court: If you are going in to prove there was a flood there, nobody disputes that—of course each individual person who saw a flood would see it a little bit different—he wants to know how it affected the business part of town—I don't think that is material—how did it affect this railroad and the car? Confine it to that.

Mr. Dick: I will omit anything except as to the railroad.

Q. 13. Are you acquainted with the part of town where the Union Station is situated, where the Pennsylvania and Cincinnati, Hamilton and Dayton and Big Four trains arrive and depart?

A. Yes sir.

Q. 14. Was there any flood there?

A. Yes sir.

Q. 15. About how deep?

A. I judge about the same depth that I mentioned.

Q. 16. And I will ask you whether at that time the railroad transportation on those three large railroads through Dayton, the C. H. & D., the Pennsylvania and the Big Four was stopped or not?

Objected to.

101 A. It was stopped.

Q. 17. Do you remember about how long it was stopped?

A. No, I don't. I don't know the exact date traffic was resumed.

Q. 18. Could you say whether it was for more than a week after the flood started?

A. Well, it was for more than a week, yes.

Q. 19. What if anything, was done, Major, with reference to the Ohio military authorities taking charge of the situation here?

Objected to.

Mr. Gilbert: We renew our objection to that.

The Court: I don't know that it is disputed—everybody says they took charge and took this property—he may answer for the time being.

A. Well, the County as a whole was placed under martial law. Of course that means that the military runs the county.

Q. 20. All of Montgomery County, Ohio?

Objected to.

A. Yes sir.

Q. 21. I will ask you to state then, whether all of the City of Dayton and Montgomery County, including Madriver Township, were under martial law.

Objected to.

A. They were.

Q. 22. Do you remember how soon the military authorities took possession?

Objected to.

A. Tuesday morning, March 25th.

Q. 23. And could you say about how long martial law continued?

A. To a limited, more or less degree, to the 1st of May.

Q. 24. Was there any loss of human life in Dayton and vicinity in connection with that flood?

Objected to.

Mr. Gilbert: We renew our objection to that.

The Court: I don't see that that is necessary.

Q. 26. Was there any extensive destruction of property?

Objected to.

Mr. Gilbert: We renew our objection to that.

The Court: I don't think it is material.

Q. 27. How long have you lived in Dayton and vicinity?

A. Twenty eight years.

Q. 28. In your knowledge of Dayton and vicinity, I will
102 ask you to state if you ever knew of so great and extensive a flood as this flood of March, 1913?

Objected to.

A. No sir.

Q. 29. You did not?
A. No sir.
Q. 30. After the military authorities took charge, Major, what if anything did they do with reference to any supplies and foodstuffs, and the sources of supplies and the like?

Objected to.

A. I can only speak for that portion called North Dayton, because that is where I was located, and had no connection for a few days with the city as a whole.
Q. 31. On account of the flood?
A. On account of the flood. Telephone communication was—there wasn't any, that was all. But in North Dayton, right after the first rescue work had been done, we began to provide food for those that did not have it.
Q. 32. And was any buying and selling done in the ordinary way?

Objected to.
Mr. Gilbert: We renew our objection to that.
The Court: I don't see how that is material.

A. Only in a military way.
Q. 33. So that the Court will understand it, tell us how that was done in a military way.

Objected to.
Mr. Gilbert: We renew our objection to that.
The Court: Sustained.

Q. 34. And how were such supplies distributed to parties needing them?

Objected to.

A. They were given gratis simply. We had a little system whereby we found out how many people were in a family and the amount of food they required, and we just dealt them out to them accordingly.
Q. 35. Do you remember, Major, about a carload of poultry in a regular live stock poultry car, I think number 739, that was side-tracked up in North Dayton, some little distance, half a mile or so, from the coal chutes of the C. H. & D.?
A. Yes sir.
Q. 36. Did you ever see that car up there?
A. Well, yes, I saw it up there once and later saw it at the Leo Street crossing.
103 Q. 37. After it had been switched down here?
A. Yes sir.
Q. 38. After the water had gone down?
A. Yes.
Q. 39. Did you meet the man in charge of it, Mr. James Shipley?
A. I did not.
Q. 40. Did you see him personally?
A. Well, I saw a man that was supposed to be him. I don't know

whether it was him or not. But we called him the chicken man, that is all.

Q. 41. I didn't mean to ask you if you had any personal acquaintance with him, but if, during the continuance of that flood and before traffic was resumed, if you saw such a man there?

A. I saw the man that they called the chicken man that was supposed to have charge of this carload of chickens.

Q. 42. Was there anyone with him part of the time, working with him, that you did know?

A. The only man that I saw with him that I knew was Lieutenant Beverstock, who was acting commissary with the Eighth Infantry when they came into North Dayton.

Q. 43. What was your resident regiment?

A. I am a member of the Third.

Q. 44. Now after you got organized, what particular part of town and part of the business did you take charge of?

A. I was provost marshall for North Dayton.

Q. 45. Was there a colonel in charge?

A. Colonel Volbreth.

Q. 46. Is he the gentleman who is a lawyer and lives at Bucyrus, Ohio?

A. Yes sir.

Q. 47. Were you present when Mr. Shipley, known as the chicken man, care-taker of this car, made any complaint about not having feed and about his chickens dying unless he could get feed?

A. I was present when the chicken man, in company with Lieutenant Beverstock called on Colonel Volbreth and asked him to take the chickens off his hands; he was out of feed, and if he didn't do that, the chances were that the majority of them would die.

Q. 48. Do you remember about what date that was?

104 A. About Monday, April 30th, or it would be March 30th or 31st, whatever the date would be, on Monday, I think.

Q. 49. The Monday following is the date that the flood came?

A. Yes sir, about the 31st of March.

Q. 50. And do you know what was done after that?

A. There was nothing done. We sent over to the chicken car some chicken feed that we had.

Q. 51. What was the nature of it, Major?

A. It was regular sacked scratch feed, wasn't a great many sacks; didn't amount to a whole lot in a carload of chickens.

Q. 52. What was next done then, after you sent feed there?

A. Along the next day this Lieutenant Beverstock came again and said that——

Counsel for plaintiff objects to what Lieutenant Beverstock said.

Q. 53. Without telling the exact words that he said, if he gave you any information, what was the nature of it?

Objected to.

A. Well, he came over and informed us that the chickens were dying, some of them were——

Objected to.

A. That we had better take them off the man's hands. Nothing was done at that time.

Q. 54. Well, if anything was done with the chickens at all, how long was it after that?

A. A day of two after that the commissary again reported that this chicken man was on his trail.

(Objected to.)

And that at that time Colonel Volbrecht calls up General Wood and asks him what to *to* with the chickens and he puts the situation before him just as it was.

(Objected to.)

What General Wood told him I don't know.

Q. 55. Of your own knowledge?

A. No. But I was present when he called up, and I know the very next morning he said to issue those chickens in lieu of meat. We had been butchering hogs which were on that side track. That afternoon I went out to the butcher and ordered him not to butcher anything more that day, that they were going to distribute chickens the following morning. So we did that.

105 Mr. Gilbert: I object to evidence about what they did with hogs.

The Court: It is not material what they did about the hogs—what they did with the chickens is all right—nobody disputes that.

Q. 56. Did you do it?

A. Yes.

Q. 57. What is the Ohio military organization? For instance, what relation does the Governor of the State as the chief executive have?

Objected to.

Mr. Gilbert: We renew our objection to that.

The Court: I think that is regulated by law—we can't leave that to a witness, what relation the Governor has to the militia.

Q. 58. And what relation does the adjutant general, Mr. Wood at Columbus have?

Mr. Gilbert: We object to that.

The Court: All those things are regulated by law.

Q. 60. And to whom did the officers, Colonel Volbrecht, report?

Mr. Gilbert: We object to that.

The Court: He may tell who they reported to.

A. Reported to General Wood.

Q. 61. And as you understand it, this poultry was distributed by the executive department of the state in that way?

Mr. Gilbert: We object to that.
The Court: Not what he understood, but what he knows about it.

A. Distributed through the National Guard, yes sir.
Q. 62. I understood you to say that there had been some hogs in that same train sidetracked with the carload of poultry.
A. Three carloads.
Q. 63. Did the State of Ohio take charge of them also?

Objected to.
Mr. Gilbert: We renew our objection.
The Court: He may answer.

A. Yes sir.
Q. 64. And were they slaughtered?
A. Slaughtered and issued.
Q. 65. And used as food to supply the needs of the people?

Objected to.

106 A. Yes sir.
Q. 66. Which were thereafter accounted for?

Objected to.

A. Yes sir.
Q. 67. As provost marshal, how soon did you take charge over in North Dayton, in the section of the town where this car of poultry was sidetracked?

Objected to.

A. April 29th—or March 29th, as provost marshal.
Q. 68. How soon did you go there after the flood came into the city?

Objected to.

A. I was there at the time.
Q. 69. Did you stay there continuously?
A. I continued there until about the 15th of April.
Q. 70. Well, now, during the time before the flood came into the City of Dayton and until these chickens were taken by the military authorities and distributed as food, I will ask you to state if you had any reuest or communication of any kind from the officers of the Cincinnati, Hamilton and Dayton Railroad Company with reference to these chickens?

Objected to.

A. I never had any.

Cross-examination.

By Mr. Gilbert:

Q. 1. You are not able to say what request, however, might have been made by some other parties?

A. No, of course I couldn't say as to that.

Q. 2. How far from the location of this car of poultry were your headquarters?

A. You mean where the car first stood?

Q. 3. Yes.

A. Oh, it is a mile.

Q. 4. You didn't spend very much time around that car then, Mr. Smith, did you?

A. No sir—very little time.

Q. 5. I believe you said you saw the car once in North Dayton, or did you so state?

A. Yes, I said I saw the car once at first, where they put it was first up north of the Leo Street crossing; then later saw the car of chickens at the Leo Street crossing.

107 Q. 6. After the military had taken charge?

A. Yes sir.

Q. 7. Now, the flood came up on the night of March 24th or 25th?

A. No, it came on the morning of the 25th.

Q. 8. And how soon did the water subside within the river banks?

A. Not until about the 28th, maybe the 29th. It was down then, I think, to about the height of the levees, on the 28th.

Q. 9. I believe you answered Mr. Dick that railroad traffic was interrupted for a few days?

A. Yes, I said for all during that week. That I think was the statement I made.

Q. 10. You thing that is correct, do you?

A. I think so.

Q. 11. That would be until about the 28th?

A. About the 30th or 31st. I might be a little bit off on dates just now.

Q. 12. After that it was resumed?

A. In a degree, yes. Owing to the fact that the bridges were washed out, it was impossible to get in and out of Dayton, of course, but they moved their freight around through the city here.

Q. 13. You do not personally know Mr. Shipley—you have no acquaintance with him?

A. No, I wouldn't know the man by that name.

Q. 14. And the conversation with some other man that you remember of having, where was that had?

A. That was at the Troy Street U. B. Church.

Q. 15. Did you know that Mr. Shipley and Mr. Nies were obtaining feed from a farmer near by that car, and did obtain food on a number of occasions?

A. I did not know that; but I understood from this man Beverstock that they had tried to get feed there.

Q. 16. Well, you don't know whether they did or not?

A. No, I couldn't say as to that.

Q. 17. You couldn't say that they did not get feed for a number of days from a man by the name of Kammer?

A. No, I couldn't say that.

Q. 18. Beverstock was the active man in disbursing this poultry?
A. Yes, he was acting commissary.
Q. 19. What day or date did the military assume charge of this car?
108 A. It must have been about the 3rd of April—3rd or 4th of April—on Saturday, I think. I may be off on dates there, because I have never made any attempt to brush up on dates.
Q. 20. Was it about the 2nd—1st or 2nd day of April? Wasn't it the 1st day of April, to be accurate?
A. I think it was about the 3rd—I am not sure.
Q. 21. You wouldn't be positive as to the date?
A. No, I wouldn't say.
Q. 22. Where was General Wood's headquarters while he was at Dayton?
A. At the Algonquin Hotel.
Q. 23. You don't know personally whether there was feed in that car or not—you never went inside the car?
A. No I wasn't inside of the car. The only thing I know for certain about chicken feed is that we, on the request of the chicken men, sent some over there.
Q. 24. Sent a small amount over there?
A. Yes sir.
Q. 25. How much?
A. There wasn't over eight of those little sacks, you know.
Q. 26. Didn't amount to very much?
A. No, didn't amount to very much for that many chickens, he said.
Q. 27. Then he went out and got his feed from this farmer, some two or three blocks from the car?
A. That is what you say, I don't know.
Q. 28. You were not there and didn't know that?
A. No—probably Beverstock would know that.

Redirect examination by Mr. Dick:

Q. 1. Major, this Lieutenant Beverstock that you speak of is the gentleman that lives up in Mansfield in this State, isn't he?
A. Yes sir. I am not sure whether he lived at Mansfield, or whether Lexington, but one of the two places.
Q. 2. At any rate, he was commissary?
A. Yes. His headquarters were at Mansfield.
Q. 3. You spoke of being up at the U. B. church in North Dayton—was that used as a military headquarters?
A. Yes sir.
Q. 4. Temporarily during the flood?
A. Yes sir.
109 Q. 5. And you answered Mr. Gilbert something about seeing the car after it was at Leo Street. Do you remember if it was brought down from the place where it had been standing up towards the coal chute to Leo Street after it was decided to distribute it, use it?
A. Yes sir.

Q. 6. As food?
A. Yes sir.

*Deposition of C. Oaks.*

CRAWFORD OAKS, of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name, please?
A. Crawford Oaks.
Q. 2. And what is your age?
A. Fifty four.
Q. 3. Where do you live?
A. Well, I live now on Rural Route on the Dayton and Springboro pike about seven miles south of Dayton, but I am just moving from Dayton, 53 Terry Street.
Q. 4. What occupation are you to follow where you are living now?
A. Farming.
Q. 5. What have you been doing recently here in the city?
A. Worked on the railroad all my life up until just two months ago.
Q. 6. At the time of the Dayton flood of March, 1913, what was your business?
A. Running an extra gang for the C. H. & D.
Q. 7. An extra gang—is that an extra track gang?
A. Yes sir—repair gang.
Q. 8. Were your duties somewhat similar to those of a section foreman?
A. Same thing—same kind of work.
Q. 9. Where was the headquarters of your gang at that time?
A. Well, we were located at the Kiser's old ball field here. We were going to tackle a washout and got as far as North Dayton at the flood—that is where we were located—wherever they put us—they took us wherever they wanted us.
110 Q. 10. At the time this great flood struck Dayton where were you?
A. North Dayton.
Q. 11. And how long did you stay there?
A. Oh, we stayed there for six weeks or seven weeks—six or seven weeks.
Q. 12. What effect did that flood have on the tracks of the Cincinnati, Hamilton and Dayton Railroad?

Objected to.

The tracks, and bridges, so far as you saw yourself?

Objected to.

A. Why, it washed out the tracks up there at this end of the bridge and the other end, everything; couldn't get no trains through.

Q. 13. Stopped business?

A. Oh, sure—stopped it right.

Q. 14. While you were there at North Dayton, I will ask you if you saw one of those special poultry cars, Number L. P. T. 739, loaded with chickens and other poultry, and in charge of a man named Shipley?

A. Yes, there was a car of poultry right on the same siding where our car was on, right back of us.

Q. 15. I will ask you if you had any talk with Shipley during that time.

Objected to.

A. No, I never talked with the man in particular about anything I helped him get some feed is all. I had my men to carry feed for him.

Q. 16. What kind of men were working in your gang?

A. Italians.

Q. 17. Do you remember the day the flood came and stopped operations on the railroad?

A. The 25th.

Q. 18. That was Tuesday?

A. Tuesday morning.

Q. 19. About how soon after that was it that you had this talk with Shipley and helped him get feed?

A. I don't just remember. It was along the early part of the week. We got feed for the hogs and I gave him some of that.

Q. 20. Was there some hogs on that track too?

Objected to.

A. Yes, two cars of hogs.

111 Q. 21. You say you got feed for the hogs and gave him some of it for the chickens?

A. Gave him some of it.

Objected to.

Q. 22. In that connection, did Mr. Shipley say anything to you with reference to any trouble he had in getting feed?

Objected to.

A. Why, he said he had to go down to see Mr. Corcoran about getting feed—the superintendent.

Q. 23. What if anything did he say to you with reference to this poultry dying if he didn't succeed in getting feed?

Objected to as suggestive and leading.

A. Well, he would have to have feed or the poultry would die. There was some of his poultry died there.

Q. 24. I want to withdraw that question—I will ask you this—tell

us in your own way, Mr. Oaks, whether this man in charge of the poultry, Mr. Shipley, said anything about not being able to get feed?

Objected to.

A. Well, I judge there was about fifty chickens died there and I believe there was one or two ducks and he throwed them out. Every morning he would throw them out and the Italians would bury them right along, in the mud and slush there, and he went to arrange or send to get some feed; and he asked me if I would get him some men to get feed; he had no way to get it. I said "Yes." I got him a couple of Italians to help him carry corn, and I gave him a sack or two sacks of corn then; had to have that. This was later on when I helped him carry corn.

Q. 25. Do you remember of any dead chickens being burned there, when you burned some coal, during that time?

Objected to.

A. No, I don't remember burning any. We buried what was throwed out. When they cleaned the car and moved it away there was about half a dozen left there. They throwed them out of the car when they pulled the car down this way.

Q. 26. Down towards Leo street?

A Yes sir.

Q. 27. How many chickens at any one day or morning were thrown out dead that you saw?

Objected to.

A. Well, the first morning, first time he throwed them out there, I think he threw out, I don't know sure, about—oh, eighteen or twenty. But then they had not been cleaned out for a day or
112 two, you know. They didn't all, I don't think all died that night, because after that there was not so many.

Q. 29. Did this occur on more than one day after that?

A. Every morning he would take out a dead chicken when he cleaned the coops.

Q. 30. Do you know from what you saw there how high the water got around that car?

A. Well, it didn't get up any ways—it was just up over the track. It wasn't any ways near getting in the car.

Q. 31. Was that a comparatively high part of town, or not?

A. It was a high place where he was at.

Q. 32. What work did you do after the water got down, with your gang?

A. Commenced repairing the track right along there, filling in wherever it was washed out.

Q. 33. Were any obstructions washed in the track by that high water?

A. Yes, indeed. There were cars turned over right back of us on the same siding we were on, but we were up a little higher, on a little knob, you know.

Q. 34. In going south from that place through Dayton, can you tell us how high the water had been over the tracks at any place?

A. It was all—them bridges and everything was full of lumber out there to the top, full of little houses, blacksmith shop, sheds, and all that; had to help clean it all up.

Q. 35. Where the tracks of the Cincinnati, Hamilton and Dayton pass through the city of Dayton, in the neighborhood of the Union Depot, do you know how high the water got there?

Objected to.

A. About seven or eight feet, eight or nine feet of water, I will say, at the Union Depot.

Q. 36. About how far back from the Great Miami River is that depot?

Objected to.

A. Back this way about two blocks—was about two blocks off or three blocks.

Cross-examination.

By Mr. Gilbert:

Q. 1. Mr. Oaks, is it?

A. Yes sir.

Q. 2. You say the water at its highest stages just got up a
113 little bit over the railroad track where the poultry car stood?

A. Yes sir, a little bit over the rails right by that train.

Q. 3. Didn't get into the car that contained the poultry?

A. No sir.

Q. 4. None of the poultry drowned that you know of?

A. No sir—oh, no.

Q. 5. Did you ever have any experience, Mr Oaks, in the shipping of poultry for long distances from the west to New York, live poultry?

A. No sir, I never shipped any.

Q. 6. Are you aware, Mr. Oaks, of the fact that in the shipping and handling of live poultry over long distances in poultry cars, that day by day, under favorable conditions, some of the weaker fowls die? Do you know that?

A. I didn't know it. I don't know anything about that—never shipped any.

Q. 7. You don't know that that is not true?

A. There would be a reason, probably, if they die.

Q. 8. But some of the fowls, the weaker fowls, lie, even under the most favorable circumstances in transportation—you don't know that not to be true?

A. I don't know a thing about it—never was in the business—I don't know.

Q. 9. You say that you noticed on one or two occasions, the fact that fowls died and were thrown out?

A. Yes sir.

Q. 10. You remember that on one occasion, during about the last week of the flood, that you furnished Shipley with some Italian labor to carry some food, as he said, for the chickens?

A. Carried some corn, yes sir.

Q. 11. Did you know, or did he tell you, where he got the corn?

A. Got it right across the woods there of a man by the name of Kammer.

Q. 12. You did furnish labor?

A. Yes sir.

Q. 13. They did bring feed?

A. They brought feed for him.

Q. 14. You think that was about the last of the week?

A. I don't remember. I gave him some corn. I made no charge of it. I went over and got a bag of corn for the hogs, made no charge of it, and he was hollowing about feed, and I gave him some.

114 Q. 15. The feed he got over there, he paid for that?

A. I don't know anything about that.

Q. 16. This car of poultry was seized, I notice from reference I made from the minutes here, on the 31st of March, 1913—that is the date the military took it?

A. On Monday, was it?

Q. 17. Yes, Monday, March 31st.

A. Yes sir, I guess that is the time they took it.

Q. 18. How many days after the 25th did the flood waters remain over the track?

A. Oh, it dried away right at that point—we were out there—we commenced working there on Thursday. The flood was on Tuesday. On Thursday we commenced filling in, filling in the holes. I was there and couldn't get away; couldn't get to Dayton and couldn't get the other way, and took fifty seven men and started to work filling in.

Q. 19. The water only remained high for two or three days—it then receded?

A. Up there; but down this way it was higher around Dayton here than up where we were at. I couldn't get into Dayton till Saturday.

Q. 20. On Saturday?

A. Yes, that is when I got home, and after I got home I couldn't get back. I started in up here to clean the track, taking the work the other way again.

Q. 21. The flood came on what day?

A. It came on the 25th, Monday—Monday night.

*Deposition of A. Biersack.*

ALPHONSE BIERSACK, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name, please?

A. My name is Alphons Biersack.

Q. 2. Where do you live, Alphons?

A. About half a mile north of Leo Street, along the C. H. & D. Railroad.

Q. 3. That is in North Dayton?

A. Yes sir.

Q. 4. How old are you?

A. Nineteen.

115 Q. 5. And how long have you lived up there?

A. Three years.

Q. 6. And do you live with your parents?

A. Yes sir.

Q. 7. What is their business?

A. Gardening.

Q. 8. Is that near the tracks of the Cincinnati, Hamilton and Dayton Railroad?

A. Yes sir.

Q. 9. Did you live there at the time of the big flood in March, 1913?

A. Yes sir.

Q. 10. Do you remember a car of poultry and some cars of hogs being stopped up there on the C. H. & D. sidetrack during the flood?

A. Yes sir.

Q. 11. Do you remember seeing Mr. Shipley, the man in charge of the car of poultry?

A. Well, I seen the man in charge, but I don't know whether his name was Shipley or not. His name I couldn't tell.

Q. 12. Is he the man that Mr. Nies was with part of the time up there?

A. Yes sir.

Q. 13. He was the man that was in charge?

A. He had charge of the car, yes sir.

Q. 14. Did he come to your house any time during the flood?

A. Only on the 25th, afternoon, he was there about a half hour; that is the only time.

Q. 15. Afternoon of the first day that the flood came?

A. Yes sir, the 25th of March.

Q. 16. Do you remember what he said when he came there?

A. No, I don't.

Q. 17. I don't mean word for word, but what was the purport of it?

Objected to.

A. Well, just talking about the flood and asking whether we thought the water would come any higher or not.

Q. 18. Now calling your attention to the subject matter of food for the chickens and poultry, what can you say about that?

Objected to.

A. Well, he asked us for feed, but we told him we didn't have any only for our own use.

116 Q. 19. And did he say anything about being short of feed for them?

Objected to.

A. Well, he didn't tell us. He said he needed it; but we told him we didn't have any.

Q. 20. Did he say anything to you about the water being up over the track where the car stood?

A. No sir.

Q. 21. Didn't say anything about that?

A. No.

Q. 22. Do you know what became of that carload of poultry, that is the fowls?

A. Why, those that we hauled, we hauled down on Leonard Street, in Grusenmeier's barn.

Q. 23. Then what day, if you remember, was it that the car was taken away from where it stood up towards the coal chute?

A. It stood up towards the coal chutes, then was taken down to Leo Street, but I couldn't exactly say what date.

Q. 24. Do you know who had charge of it when it was taken down to Leo Street?

Objected to.

A. No, I don't.

Q. 25. Did you help in doing the hauling?

A. Helped haul chickens, four loads.

Q. 26. Who had you do it?

A. Lieutenant Beverstock, I think was the one that ordered us.

Q. 27. What I mean is, were you employed to do that or directed to do it by the soldiers?

A. Directed to do it—we had to do it.

Objected to.

Q. 28. You had to do it?

A. Yes sir.

Q. 29. If you know, or when you was there, who was it was taking charge of the car at that time?

Objected to.

A. Lieutenant Beverstock ordered us—then there was a major, but I don't know his name, had us to go down and get a load.

Q. 30. What I want to get at is, if you know, from what you saw, who was in charge at that time? Was it the caretaker of the car or the railroad or the soldiers?

Objected to.

117 A. The soldiers, so far as I could understand.

Q. 31. And it was the soldiers then, who told you to do what you did?

A. Yes sir.

Objected to.

Q. 32. Did you see any of those chickens given out to families in need of food?
A. Yes sir, I did.
Q. 33. Where was it you say you took what you hauled in your wagon?
A. What do you say?
Q. 34. Where did you take what you hauled away in your wagon?
A. In Leonard Street in Grusenmeier's barn.
Q. 35. Who had charge there?
A. That I don't know. All we done was to throw them up in the barn. They had half a dozen soldiers there helping us unload them, put them in the hay loft. That is all I know.
Q. 36. Were soldiers in charge of that place, too?

Objected to.

A. Well, I guess they was, because they helped unload them and everything. That is all I seen around there; they was soldiers.
Q. 37. Did you know Lieutenant Beverstock by sight when he was out there?
A. I knew him when I seen him—never knowed him before.
Q. 38. But you knew who he was while he was there?
A. Yes sir.
Q. 39. I will ask you to state if you saw one soldier in particular there, that was sometimes called "Red," a man with red hair?

Objected to.

A. Kind of tall, heavy set fellow?
Q. 40. Yes.
A. Did he always go with that Lieutenant Beverstock? There was a fellow there that they called Red that I knowed of, yes sir.

Cross-examination.

By Mr. Gilbert:

Q. 1. Mr. Biersack, you don't know how these men happened to take charge of this poultry, whether the railroad company asked them to take it and distribute it, or in what way they happened to do it?
118
A. No, I don't.
Q. 2. You have no personal knowledge on that subject?
A. No, I do not.

*Deposition of J. Kammer.*

JACOB KAMMER, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name, please?
A. Jacob Kammer.
Q. 2. Are you also known as Jake?
A. Yes sir.
Q. 3. Where do you live?
A. Out on the Troy pike, Rural route 3.
Q. 4. About how far from the down-town part of the city would that be?
A. About two miles to the Courthouse.
Q. 5. Is that in the vicinity known as North Dayton?
A. Yes sir.
Q. 6. You live with your father there?
A. Yes sir.
Q. 7. What is your age?
A. Twenty one.
Q. 8. And what is your father's business?
A. Gardener.
Q. 9. Did you live out there at the time of the big flood of March, 1913?

Objected to.

A. Yes sir.
Q. 10. Do you remember the time of that flood?
A. Yes sir.
Q. 11. Do you remember what day it came on, day of the week or month?
A. Yes sir.
Q. 12. What day was it?
A. 25th.
Q. 13. 25th of March?
A. Of March.
119 Q. 14. And do you live near where some cars were side-tracked on the C. H. & D. there?
A. Yes sir.
Q. 15. Do you remember some cars of hogs and a car of poultry that were out in that part of town?
A. Yes sir.
Q. 16. Did you see a man named Shipley who was caretaker in charge of a car of poultry?
A. Yes sir.
Q. 17. Did he come to your father's house during the flood?
A. Well, he came there and got some corn.
Q. 18. He did?
A. Yes sir.
Q. 19. About what date was that?
A. That was on, let's see—that was on Tuesday—Tuesday and Thursday, and then Sunday again.

Q. 20. Did he say anything as to being out of feed or otherwise for his poultry?

A. Why, he said he didn't have any more for the poultry, any more feed—he had a little; didn't have enough to reach him; he said he wanted to get some, and so we gave it to him.

Q. 21. Did he get some at your father's place?

A. Yes sir.

Q. 22. And how did he get it to the car?

A. We carried it over in sacks.

Q. 23. Was there any water about at that time?

A. No sir. Oh, there was water down below our house, but we went through the woods back of our barn.

Q. 24. Roundabout way?

A. Yes sir, roundabout way.

Q. 25. What do you know about the military authorities buying any corn at your place?

A. Well, they got some corn over there for the pigs.

Q. 26. What day?

A. Why, the same day.

Q. 27. How much did the military authorities get?

Objected to.

A. I think they got about thirty or forty bushels—I guess maybe more than that.

Q. 28. And where was that taken?

A. Back to the cars and gave it to the pigs right away at the cars.

Q. 29. Gave it to the pigs in the cars?

A. Yes sir.

120 Q. 30. Was that before or after the corn was carried in sacks for the chickens?

Objected to.

A. Well, they carried it in sacks. There was some dagos working for the railroad company. They carried it over, gave it to them right away; and for the chickens we carried it over ourselves, me and my father.

Q. 31. Do you know, Jake, who had charge of what was done there at that time?

Objected to.

A. No, I don't.

Q. 32. I mean, whether it was the ordinary civil public authorities or soldiers that were in charge?

Objected to.

A. That is something I couldn't tell you.

Q. 33. Was the water up on any part of your place?

A. Yes sir.

Cross-examination.

By Mr. Gilbert:

Q. 1. Mr. Kammer, you say it was on Sunday—that would be March 30th, that Mr. Shipley came out to your father's place and got a supply of feed for the chickens?

A. Yes sir.

Q. 2. Did Mr. Shipley get feed more than once from your father's?

A. Yes sir, he got it twice.

Q. 3. When was the other occasion of his obtaining feed from your father?

A. On Thursday before the Sunday.

Q. 4. That would be the 27th?

A. Yes sir.

Q. 5. That would be March 27th?

A. Yes sir.

Q. 6. He got feed from your father at that time?

A. Yes sir.

Q. 7. Now on the next day after Sunday, March 31st, the poultry fell into the hands of the National Guards, did it?

A. I couldn't say when it did, but one of those days—either on a Monday or Tuesday.

Q. 8. Mr. Shipley was the caretaker that came long with the car of poultry?

A. Yes sir.

Q. 9. Do you know Mr. Nies?

121 A. Mr. Nies, yes sir.

Q. 10. Was he over at your father's at the time Mr. Shipley was purchasing feed for the poultry?

A. Yes sir.

Q. 11. How often was Mr. Nies over there?

A. Twice with Mr. Shipley.

Q. 12. Who paid for this feed that Mr. Shipley bought?

A. Mr. Shipley paid for it himself.

Redirect examination.

By Mr. Dick:

Q. 1. When was it, which time was it, that the corn for the hogs was obtained from your father's—was that on Thursday or on Sunday?

Objected to.

A. Corn for hogs was gotten three or four different times.

Q. 2. Isn't — a fact that corn for the hogs was hauled in wagon?

Objected to.

A. Some was—about two or three loads hauled in wagons, I believe—two loads, I believe.

Q. 3. Which day was that, if you remember?

A. That was in the middle of the week after—that was on the first of April, I guess—along in there somewheres.

Q. 4. Do you know what the military authorities did with those hogs?

Objected to.

A. No, I couldn't tell you. They drove them away from there; where they took them I never heard or anything about it.

Q. 5. They were in charge at that time?

A. They were in charge.

*Deposition of J. Biersack.*

JOHN BIERSACK, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name?

A. John Biersack.

Q. 2. Where do you live?

A. North Dayton, on the C. H. & D.

122 Q. 3. What is your business?

A. I am a trucker—my business is gardening.

Q. 4. Gardener?

A. Yes.

Q. 5. And you say that your place is near the tracks of the C. H. & D. railroad?

A. Yes sir, right along the C. H. & D.

Q. 6. How far is that from the downtown part of the City of Dayton?

A. It is half a mile from the city limits—that is, from the corporation line.

Q. 7. Half a mile from the corporation line?

A. Yes sir.

Q. 8. How far is that from the downtown part of the city?

A. A mile and a half or two miles around the road; this is the *we* we got to go.

Q. 9. Do you remember the flood that happened here in the latter part of March, 1913?

A. Yes sir.

Q. 10. Were you at home out there in North Dayton at that time?

A. Yes sir.

Q. 11. Did you see a carload of poultry sidetracked up in that part of town on the C. H. & D. railroad track?

A. I did, sir.

Q. 12. And did you see a man named Shipley, the caretaker in charge of the car?

A. I never found out his name, but there was a man with the car all the time.

Q. 13. Well, was there a Mr. Nies who lives out in that part of town with him part of the time?

A. Yes sir, he was there the biggest part of the time.

Q. 14. Was the man that was with Mr. Nies pointed out to you as the man in charge of that car?

A. He was, yes sir.

Q. 15. Assuming that his name was Shipley, did he ever come to see you at your place?

A. No, he was there the morning them people came up there.

Objected to.

Q. 16. Were you home at that time?

A. Yes sir.

Q. 17. What if anything, did he say about being short of corn?

123 A. He didn't ask me for any feed, not at that time—he never did ask me for any feed, but the militia boys did—what they called Major, he wanted some feed.

Q. 18. For what?

A. For chickens.

Q. 19. Do you remember what day that was?

A. I didn't keep track of it—it was three or four days after the flood, I guess—they went to the neighbors and got feed after they didn't get it from me.

Q. 20. You say they came to you for feed, the militia boys?

A. Yes sir.

Q. 21. Did you have any feed for them?

A. No, I told them I had to buy my corn—couldn't get out at the time and I only had enough for my hogs.

Counsel for plaintiff objects to anything that was said between the militia and moves that the answer in this respect be stricken out.

Q. 22. Who had charge of the situation there and of the food supplies out in North Dayton immediately following that flood, Mr. Biersack?

A. How do you mean?

Q. 23. Whether it was any particular authorities had charge of it.

A. Of the food?

Q. 24. Yes.

A. Of them chickens?

Q. 25. Yes, food supplies of all kinds.

A. I don't know—I wasn't there to see whether any particular party took care of it or not—I never had paid much attention to it—I had too much work of my own up there.

Q. 26. Did you notice whether there were any soldiers in charge?

Objected to.

A. No, I didn't.

Q. 27. Do you know what became of those chickens?

A. What I hauled, I do—I don't know what became of them—I know where they hauled them to.

Q. 28. If you did haul any chickens, at whose request or command did you do it?

Objected to.

A. The man they called Major, of the soldiers.

Q. 29. Man in charge of the soldiers?

A. Yes sir.

124 Q. 30. Did you volunteer to do that work or were you ordered?

A. I was ordered to do it—I was hitched to the plow—they made me unhitch out of the plow and hitch to the wagon and haul these chickens where they wanted them hauled.

Q. 31. Where did you haul them to?

A. Right across from the U. B. Church on Troy Street, in Grusenmeir's barn, where we unloaded them.

Q. 32. Did you notice these military men there at the U. B. church?

A. Yes sir, they had headquarters there.

Q. 33. Where was the car of chickens when you got these loads on your wagon?

A. Right across from my house—right adjoining my land outside.

Q. 34. Had it been moved somewhat to the south from where it stood at the time of the flood?

A. Well, about the same—afterwards they moved it south.

Q. 35. A week after the Dayton flood came?

A. Yes sir—I can't say exactly, four or five days, after they could get down further, that they could haul, they moved it towards town, close to Leo street.

Q. 36. At the time the water was the highest, was there any obstructions washed on the railroad track south of where the car stood when the flood was highest?

A. Not right where the car was, no.

Q. 37. But further south?

A. Yes sir, there was lots of stuff further south—lots of drift stuff there.

Q. 38. You say after the water went down enough to clear off some, they moved the car down towards Leo street?

A. Yes, the following Sunday after the flood, they cleared the track and Monday or Tuesday, sometime that week, they moved the car on down.

Q. 39. Did you see what was done with any of the chickens then?

A. No, I didn't.

Cross-examination.

By Mr. Gilbert:

Q. 1. Mr. Biersack, your residence is in the country north of Dayton.

A. Yes sir.

125 Q. 2. And you observed Mr. Shipley, assisted by Mr. Nies, feeding and caring for this car of poultry, up to the time that the National Guard—State guards, took charge?

A. They never got any feed of me.

Q. 3. I did not ask about that.

(Question read by the stenographer.)

A. Those men, that I helped them?

Q. 4. No, you saw them.

A. Yes. I didn't quite understand it—in German I could understand you better.

Q. 5. Are you German?

A. Yes—I can understand German a good deal better than English—when these high words come, I don't understand.

Q. 6. You saw them watering and feeding the poultry on the car?

A. Yes—not all the time, but when I went up around there. I hadn't time to watch them very much, because I had work of my own.

Q. 7. Mr. Shipley was assisted there, that is most of the time by Mr. Nies—you know Mr. Nies?

A. Yes sir, he lived close by me.

Q. 8. One of your neighbors?

A. Yes he was at the time—is not now—he was at that time.

Q. 9. And how long did you see this man Shipley there?

A. Well he was there when we hauled the chickens—he was always there—but after they moved the car on down I didn't pay any attention to him—I don't know whether he was there or not.

Q. 10. He was still there with the car when you were hauling the chickens under the order of the State Guards?

A. Yes, he was there.

Q. 11. Now where did you say he got feed?

A. Of Mr. Kammer.

Q. 12. Do you know Mr. Kammer?

A. Yes sir, he is a neighbor of mine.

Q. 13. You know of their getting feed from Kammer for the poultry?

A. They got feed over there—the militia men get feed from Kammer.

Q. 14. But before the militia men, did you know of Mr. Shipley or Mr. Nies getting feed?

A. Well they got feed at Kammer's then.

Q. 15. You think it was four or five days from the time of
126 the beginning of the flood until the car was moved down on Leo Street?

A. Yes, from the flood it was longer than that, that is from the flood. The flood was on the 25th and they couldn't get down there that week at all, that car stood there all that week. The week after that I didn't keep track though, what day they moved it down, but they moved it down the following week.

Q. 16. The State Guards took charge of the car on Monday March 31st—is that correct?

A. I guess that is about right—I didn't put any of it down—I suppose that is about right.

Q. 17. That is that day you hauled this load over to this place you speak of?

A. Yes, over there by the U. B. Church.

Q. 18. You have no personal knowledge or information as to how the state guards happened to take charge of this car of poultry? You don't know whether they had any arrangement or had any request from any of the agents of the railroad?

A. No, I don't. They came up there the morning we hauled a load and the car was locked.

Q. 19. You know nothing of anything that transpired between any agents of the railroad Company and the military officers, do you?

A. No, I know nothing about that.

Q. 20. When you speak of soldiers in your testimony you mean the State guards, don't you?

A. I guess that is what they were.

Q. 21. Guards of Ohio—what you call state guards?

A. They are what I call militia.

Mr. Dick: That is assuming something—I think they are called the Ohio National Guards.

Q. 22. They are not in the service of the Government at all—these men were simply state guards?

Objected to on the ground that counsel is asking a question of law of the witness.

A. Yes sir.

Q. 23. Do you know whether these men that you speak of were United States troops, United States soldiers, or state guards?

A. Well no I don't—I don't know anything about that at all—I am not educated enough to know anything about that—they call them militia.

127 Q. 24. Were they under the control of the National Government or the state authorities?

Mr. Dick: If he knows.

A. I don't know that—they wore yellow clothes—come up there and ordered me, showed fight, showed the guns—if we didn't go they threatened to kill us. They done that to a neighbor of mine—they would have done it to me if I hadn't. I had hitched in the plow. I said 'What about my work' they said 'To hell with your work.' I did as they told me.

Mr. Gilbert: I object to all this.

Mr. Dick: It is in response to your question.

Witness: They made me—I——

Mr. Gilbert: I object to all this voluntary statement of the witness.

Redirect examination.

By Mr. Dick:

Q. 1. Were these men who were referred to as soldiers, and that I referred to as the Ohio National Guards, in uniform?
A. Yes sir, they were in uniform.
Q. 2. Was it this yellow or Khaki color?
A. Yes sir, yellow uniform they wore.
Q. 3. As I understand it, you and others were compelled to do the work they wanted at the point of the gun?

Objected to.

A. Yes sir.

*Deposition of D. L. Fleming.*

D. L. FLEMING, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Mr. Fleming will you state your name and your present residence and business?
A. My residence is 1814 East Fifth Street—bookkeeper for the S. J. Patterson Company, Dayton—name D. L. Fleming.
Q. 2. Are they coal dealers here?
A. Yes sir.
Q. 3. What was your business at the time of the flood in Dayton in March, 1913?
128 A. Chief clerk to the division superintendent of the C. H. & D. Toledo division.
Q. 4. What was the name of the superintendent at that time?
A. J. J. Corcoran.
Q. 5. Is that the gentlemen who is now with the Pere Marquette Railroad in Michigan?
A. Yes sir.
Q. 6. That name is Corcoran?
A. Yes sir.
Q. 7. Do you remember that flood?
A. Yes sir.
Q. 8. Where was your office at that time?
A. Webster, near Third.
Q. 9. And what part of Dayton is that?
A. Well, that is east from here—rather northeast.
Q. 10. Does the main line of the C. H. & D. railroad running from Cincinnati up through Dayton towards Lima and Toledo pass that point?
A. Yes sir. The team track and freight house are between the office and the main line—that is a joint track there.

Q. 11. When did that flood come to Dayton?

A. Well it was Tuesday morning. The first I noticed of it was about 8:15, I would judge March 25th.

Q. 12. What effect did it have there, that is as to how much flood?

A. Well it was within about a foot and a half, possibly two feet of the second floor.

(Objected to.)

About two and a half or three feet of the second floor.

(Question and answer are objected to.)

Q. 13. How deep above the main track of the C. H. & D. railroad at that point was the water, from what you saw?

Objected to.

A. Well it is about nine feet there at the railroad tracks; a little deeper at the depot opposite.

Q. 14. What effect did it have on the movement of traffic through Dayton on the C. H. & D. between Cincinnati and the north?

Objected to.

A. Well, Tuesday night—Monday night or Tuesday morning, the last train southbound, due here about six o'clock was considerably late; to what extent I can't say, and there was no traffic of any
129 nature to I think April 9th; I am not sure as to that; but it was in April, I think about the 9th.

(It is moved to strike out the answer of the witness.)

Q. 15. If you were detained in the office at any time by the water coming up around the building, Mr. Fleming, tell us how long it was.

Objected to.

A. Thursday morning, I think it was about 8:30 or thereabouts, from Tuesday morning until Thursday morning.

Q. 16. You remained in the office from Tuesday morning until Thursday morning?

A. Yes sir.

Q. 17. Was anybody else detained there with you in that way?

A. I think there was twenty six of us there—not all employees—some refugees.

Q. 18. Do you remember where Mr. Corcoran was at that time?

A. He was with me.

Q. 19. Was his office in Dayton at that time?

A. Yes sir.

Q. 20. Now after the flood had subsided sufficiently so that you could get out of the office, I will ask you to state if you personally went out over the property of the C. H. & D. Railroad, in connection with your duties, to observe any of the conditions?

Objected to.

A. Yes sir.

Q. 21. Do you remember the locality known as North Dayton, up north of the city, in the vicinity of where the C. H. & D. coal chute is?

A. Yes sir.

Q. 22. Did you go up there after the water had subsided somewhat?

A. Yes sir.

Q. 23. I will ask you to state if you remember a carload of poultry in a poultry car, I believe L. P. T. Number 739, that was sidetracked some distance south of this coal chute?

A. I remember a car of poultry, but I can't say as to the initial or number.

Q. 24. Do you remember of there being a caretaker in charge of that poultry?

A. Yes sir.

Q. 25. Do you remember if on the side track, on the same
130 track with the car load of poultry, there was a couple of car loads of hogs?

A. Yes sir, there was some hogs there.

Q. 26. Now, did you meet the caretaker of this poultry, a Mr. Shipley?

A. I don't know what his name was. I met a man who claimed to be in charge of the poultry.

Q. 27. Did you see him more than once?

A. Twice I recall.

Q. 28. Did he make any complaint to you, or state anything to you with reference to the conditions there at that time?

Any statement made by Shipley is objected to by plaintiff.

A. He wanted to know in connection with when traffic would possibly be opened, and also where he could get feed.

Q. 29. Did he say anything about being short of feed?

A. Yes, he said he would have to have some feed for the poultry. It was only for such a short time, two or three days, the way he made mention of it, he would be out of feed.

Q. 30. Do you know what became of this carload of poultry?

Objected to.

A. It was confiscated, but I couldn't say whether by the militia or the relief society here.

Q. 31. Do you know whether or not the Ohio National Guard, under the direction of the Governor of Ohio, had charge of the force here at Dayton for a while during and after the flood?

Objected to.

Mr. Gilbert: We renew our objection to that.

The Court: I will let them prove that for the present.

A. Yes sir.

Q. 32. And was there also a relief committee looking after affairs

in the part of the city of Dayton in the vicinity of the National Cash register?

A. Yes sir.

Q. 33. The National Cash Register works are in what part of the city with reference to North Dayton?

Objected to.

A. They are south.

Q. 34. And about how many miles away from it?

A. Well, in the neighborhood of a mile and a quarter, I should judge, from here.

Q. 35. Well, what I want to get at is how far would it be
131 from North Dayton, in the neighborhood of where this car of poultry stood at the time of the flood, to the Cash Register works?

Objected to.

A. About three miles and a half.

Q. 36. Now, whoever it was that took charge of that car and confiscated it, I will ask you to state whether you personally had anything to do with that, or requested them to do it?

Objected to.

A. Not with the relief or the military I didn't.

Q. 37. Was any other stock or foods in possession of the railroads taken in charge by the military or relief committee during the flood?

Objected to.

Mr. Gilbert: We renew our objection to that.

The Court: It is not very material except that it shows what they did there—I am not deciding that question yet—the defense is contending here that this property was taken by the military force of the State of Ohio, and not only this property but other property—the contention is that if this is true they are not liable—I will let them make the proof and incidentally they may prove that other property was taken—I am not going to say it is a defense, for I am not deciding that question as yet.

A. Yes sir.

Q. 38. Do you remember what, if anything, was done with the carloads of live hops that were sidetracked in the same vicinity and same trainload as this carload of poultry?

Objected to.

A. They were taken, I think, by Burkhardt, one of the slaughter houses here—I couldn't say which one, but I think Burkhardt.

Q. 39. Do you remember whether that was done by the military authorities?

Objected to.

A. I couldn't say as to that—I don't remember.

Q. 40. What is your age, Mr. Fleming?
A. Forty three.
Q. 41. How long have you lived in Dayton and vicinity?
A. A year ago last December.
Q. 42. A year ago last December?
A. Yes sir.
Q. 43. Where did you live before that?
132 A. In Cincinnati.
Q. 44. Did you observe anything of the extent of damage done by this high water to the tracks used by the Cincinnati, Hamilton and Dayton Railroad through Dayton?

Objected to.

A. Yes sir.
Q. 45. And in the vicinity?
A. Yes sir.
Q. 46. And tell us in a general way what that was.

Objected to.

A. Well, in the first place, North Dayton, at our coal docks, we had a washout there and all the way up as far as Troy and a little bit north of there. I am not sure, but I think the first train set into Dayton from the north was about April 9th; but of course there was more or less wash between here and North Dayton, but they were very trivial. South of here the bridge crossing the river here, the joint tracks, was out of commission for over a month, as well as our tracks from here to about two miles and a half south of Hamilton, a great portion of it had to be rebuilt; and I think it was about five weeks, I am not sure, between four and five weeks before there was a train operated from the south into Dayton.
Q. 47. Where the water had been deeper over the track, such as you have described in the vicinity of the office, I will ask you to state if any obstructions were floated on the track, such as wreckage of houses and dead animals and things of that kind?

Objected to.

A. Yes sir, quite a bit.
Q. 48. Describe in your own way, what you found when you emerged from your office, around over the track?

Objected to.

A. Well, we found quite a quantity of lumber, some frame buildings at the Madriver bridge, and horses at the Madriver bridge probably twenty feet high.
Q. 49. Lumber and other wreckage you say?
A. Yes sir, drift.
Q. 50. Do you know whether the Pennsylvania Railroad and the Big Four railroad continued to be operated through Dayton during the flood?

Objected to.

A. You mean without any interruption?

Q. 51. Yes, without any interruption.

133 A. No sir, they did not.

Q. 52. Was traffic on those railroads also interrupted?

Objected to.

A. To some extent. They got in to Huffman Avenue, up here, and Fifth Street—that is the Pennsylvania. But the Big Four, they didn't get in, I don't think, until possibly a week afterwards.

Q. 53. I will ask you whether or not the Pennsylvania was also interrupted in their line crossing the Miami River and going over towards Richmond, Indiana, and Indianapolis?

Objected to.

A. Yes, the same as we were.

Q. 54. Sir?

A. They were in the same condition we were.

Cross-examination.

By Mr. Gilbert:

Q. 1. You were chief clerk to Mr. J. J. Corcoran?

A. Yes sir.

Q. 2. And what was his position?

A Superintendent of the Toledo division of the C. H. & D.

Q. 3. Superintendent of what?

A. The Toledo division of the C. H. & D.

Q. 4. Now the Big Four and Pennsylvania run through Dayton?

A. They do.

Q. 5. Did at that time?

A. No. You mean after the flood or prior to it?

Q. 6. Well, the railroad was here, wasn't it?

A. Only part of it.

Q. 7. The Pennsylvania and Big Four were not here at the time of the flood?

A. I don't just understand your question. Do you mean that they operated through here, or their tracks——

Q. 8. I didn't ask you about the operation.

A. Yes sir, the tracks were here at that time.

Q. 9. Now, you say it was about the 9th of April before trains ran from North Dayton down into Dayton proper?

A. I don't understand you?

(Question repeated by the stenographer.)

A. Got into Dayton proper from the north.

Q. 10. How do you fix that date?

A. Well, I think it was about April 9th when we got this

134 bridge open up here. It was very set in my mind at that time.

Q. 11. What direction does the C. H. & D. Railroad run from Dayton to the south?

A. From Dayton south?

Q. 12. Yes—what direction does the C. H. & D. Railroad leave Dayton.

A. Going south?

Q. 13. No, going east or north

Objected to as not being an intelligible question.

Q. 14. In what direction does the C. H. & D. extend through and out of Dayton?

A. It enters from the southwest, runs due east until Jefferson Street, then runs northeast.

Q. 15. To what point?

A. To Third Street—between Third and Second—then runs almost due north.

Q. 15. To what place?

A. Well, indefinitely—I don't know how far up there it goes—but you can take it here it is almost due north.

Q. 16. What do you know about the condition of the road there?

A. In North Dayton?

Q. 17. No, in the other end of the line, in the other direction, going north?

A. Well, as far as Troy from Dayton, the water was very severe; washed out three bridges. Had some water in Toledo.

Q. 18. What about the traffic in that direction?

A. Had some traffic between Sidney and Toledo after the third or fourth day.

Q. 19. Now this car was in North Dayton at the time of the flood?

A. Yes sir.

Q. 20. It had come from the south?

A. Yes sir.

Q. 21. And had been carried through Dayton?

A. Carried through Dayton and set off up in the North Dayton yards.

Q. 22. This car was routed to Newark, New Jersey, was it not?

A. Some place in the east.

Q. 23. In leaving Dayton this car would go on to the north, would it not?

135 A. Yes sir.

Q. 24. There was no necessity for that car being drawn back through Dayton to get it out of the city, was there?

A. No sir.

Q. 25. When did you say that traffic was resumed on the north end?

A. I think about April 9th.

Q. 26. From the north end of?

A. What point on the north end?

Q. 27. Well, this car was routed to Newark, New Jersey—you know what line it would go through.

A. Yes sir, the Nickel Plate, I guess.

Q. 28. All right—what do you know about that line?

A. As I said, Troy is about twenty miles north of Dayton. The water had washed out the tracks between Troy and North Dayton where this car was located, when traffic was opened into North Dayton, about April 9th.

Q. 29. Then it would go on through?

A. Yes, to Liepsic Junction, wherever they would connect with the Nickel Plate.

Q. 30. This road north was in condition for transportation prior to that time, wasn't it?

A. Possibly three or four days after the flood.

Q. 31. Three or four days after the flood?

A. Yes sir, north of Troy.

Q. 32. Where is Troy?

A. Twenty miles from here, north.

Redirect examination.

By Mr. Dick:

Q. 1. Mr. Fleming, assuming that this car was routed over the C. H. & D. from Cincinnati to Liepsic Junction, then east over the Nickel Plate to the Lackawanna Line, were the railroad bridges along the line that it would have to pass over in operation at any time before the 9th of April, 1913.

Objected to.

A. Not to my recollection.

Q. 2. Can you tell us the nearest big cities to which the Big Four Railroad that passes through Dayton runs in either direction from Dayton?

A. Well, there is Springfield, Bellefontaine, Delaware and Columbus east and north and Middletown and Cincinnati south.

Q. 3. Say Columbus on the north and east and Cincinnati on the south?

136 A. Yes.

Q. 4. And is that a line on which traffic was also unopened?

A. Yes sir.

Q. 5. And the part of the Pennsylvania, or as it is known, the Pan Handle, that runs through here, where does it runs to the east and where *it* does it run to the west?

A. It runs to Richmond from here west; goes to Columbus east from here.

Q. 6. And you say its bridges across the Miami here at Dayton was the same as the C. H. & D. bridge, destroyed?

Objected to.

A. Yes sir.

Q. 7. And traffic was also interrupted on the Pan Handle road?

Objected to.

A. Yes sir.

*Deposition of W. B. Knoll.*

WILLIAM B. KNOLL, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Where do you live, Captain?
A. Here in Dayton.
Q. 2. Outside of your connection with the Ohio National Guard, have you any other business?
A. No sir.
Q. 3. You make that your principal business, do you?
A. Yes sir.
Q. 4. And is that the same thing as is popularly called a militiaman sometimes?
A. Yes sir.
Q. 5. What is the official name of the organization under the Ohio law?
A. I belong to the Third Ohio infantry; that is the official designation, as part of the organized militia, known as the Ohio National Guard.
Q. 6. What did you say your regiment is?
A. Third Ohio infantry.
Q. 7. Were you here, Captain, at the time of the flood of March, 1913?
137 A. Yes sir.
Q. 8. And what connection did you have with the military organization here then?
A. Well, the military part—I was at the time adjutant of the Third Regiment, and we were stationed at various parts of the City of Dayton as troops.
Q. 9. Were you personally stationed?
A. Well, you mean any particular date?
Q. 10. Well, say when the military were first called out after the flood.

Objected to.

A. Well, I was on duty from March 27th until May 6th officially with the troops.
Q. 11. Until May 6th?
A. Yes sir.
Q. 12. Where were you then, Captain, the first two or three days of the flood, immediately following the time the water came up into Dayton?
A. At the Rike Kumler building.
Q. 13. Down town?
A. Yes sir.

Q. 14. When did that flood first come on, if you remember?
A. On the morning of March 25th is my recollection.
Q. 15. And when did it reach its height?
A. About 1:30 on March 25th, the part of town in which I was located.
Q. 16. In the afternoon?
A. Yes.
Q. 17. What was the depth of the water there at that time?

Objected to.

A. About ten feet.
Q. 18. Now, do you remember anything about a carload of poultry in a regular poultry car, known I believe, as L. P. T. car 739, that was isolated here at Dayton, in North Dayton at the time of the high water? The car belonged to the Collins Produce Company of Mount Vernon, Illinois.
A. I knew nothing of that until after I had been placed on duty as a member of the board of officers which was appointed by the Governor of Ohio, for the purpose of contesting claims arising out of the flood. That was my first official knowledge of that, or otherwise.

Objected to.

Q. 19. Well, was there a board of inquiry that had a hear-
138 ing to inquire into the claim of this Collins Produce Company growing out of the taking of this carload of poultry?

Objected to.

A. Not that particular claim, no.
Q. 20. Well, do you remember a claim presented by a Mr. Begg of Mount Vernon, Illinois?
A. Yes sir.
Q. 21. Did your Board inquire into the claim by him for a carload of poultry?

Objected to.
Mr. Gilbert: We renew our objection to that—any action taken by the flood committee over in Ohio can have no bearing on the rights of the parties here.
Mr. Whitnel: The plaintiff here filed his claim there, submitted his claim to the Governor of the State, as I understand it.
Mr. Gilbert: That certainly could have no bearing on the liability existing between the shipper and carrier.
The Court: I don't think that the fact that they made a claim against somebody up there would deprive them of any rights they may have in this case. What I have held heretofore, and what I hold now, is that they may prove what was done there—they may prove the flood, which has been proved and what was done with the property—they may prove what was done there—this would not be very material—I doubt if it is.

A. Yes sir, you might say we did.

Moved to strike out the answer.

Q. 22. Did Mr. G. Cyril Begg of Mount Vernon appear before your Board?

Objected to.

A. Yes sir.
Q. 23. Here in the City of Dayton?
A. Yes.
Q. 24. W-ere did the Board have a hearing?

Objected to.

A. At the Algonquin Hotel.
Q. 25. About when was that?
A. That is hard to say. We were in session from May 6th up until the 1st of August.
Q. 26. Who were the members of the Board?

Objected to.

A. Colonel H. G. Catrow, myself and Captain Cyrus E. Meade.

139 Q. 27. Was any recommendation or award made?

Objected to.

Q. Can you tell us, Captain?
A. Yes sir.
Q. 28. What was it?

Objected to.

A. I don't know the amount.
Q. 29. Can you tell us who handled the funds that were used for the relief of the sufferers and from which any award might be paid on your recommendation?

Objected to as immaterial and in no way affecting the issues between the plaintiff and the defendant in this case.

A. The funds were handled by the different committees after they were consolidated under the Red Cross—American Red Cross.
Q. 30. American Red Cross?
A. Yes sir.
Q. 31. Do you know whether Mr. Isaac D. Pugh, State Treasurer of the Red Cross at Columbus would be and was the man whose duty it was at that time to make checks for the award of your Board?

Objected to.

Mr. Gilbert: We renew our objection to that.

The Court: I don't think it is material to show what the Red Cross did about paying claims, unless they paid this claim—of course, if you got your money once, it don't make any difference who you got it from.

Mr. Whitnel: The hearing was had and the award was fixed and the check forwarded.

The Court: If you received part of your pay, that may be shown.

Mr. Gilbert: We received nothing.

Mr. Dick: We expect to follow this up with the deposition of the Treasurer that he forwarded the check.

The Court: They say they didn't get it.

Mr. Dick: They returned it—they would not accept it.

The Court: They were not bound to accept it, but if they got one thousand dollars on their claim, it would be reduced that much—they didn't get it, they say, at all—of course I will let you prove that, if you can.

A. He was the treasurer.

Q. 32. Well, if any action was taken on your award, or
140 recommendation, would it be paid by that particular Red Cross treasurer I have mentioned, Mr. Pugh of Columbus?

Objected to.

A. He issued checks on our recommendation.

Q. 33. Did Mr. Begg testify before your Board in person?

Objected to.

A. Yes sir.

Q. 34. And I will ask you if he also produced some affidavits for that hearing?

Objected to.

A. I am not sure.

Q. 35. Were any steps taken to show by the military officers who actually handled the matter—what poultry belonging to Mr. Begg's company was taken and what was done with them?

Objected to.

A. If any steps were taken to show what was done with it?

Q. 36. Yes.

A. Only in the evidence which Mr. Beggs himself produced; that is all I know of.

Q. 37. Possibly some other of the officers of the Ohio National Guard were present in the part of Dayton where the car was in the height of the flood—in the part of town where it was unloaded and distributed, I mean—was the evidence of any such officer taken to show the disposition of the fowls?

Objected to.

A. I know at these hearings there were some written communications from various officers bearing on the claim that was filed and attached to the evidence of that claim when the recommendation was made.

Q. 38. Captain, how long have you lived in Dayton?

A. Fourteen years.

Q. 39. In your experience in this city, have you ever known of any flood of as great magnitude as this flood of March, 1913?

Objected to.

A. No sir.
Q. 39. Was it accompanied by any loss of human life?
A. Yes sir.
Q. 40. And I will ask you to what extent, if any, there was any damage or destruction of property?

Objected to.

A. I don't know—of course there was a great deal of destruction.
Q. 41. Were any frame houses destroyed and moved away?

141 Objected to.

A. Yes sir.
Q. 42. Were many horses drowned?

Objected to.

A. Yes sir.

*Deposition of Joe Wilkin.*

JOE WILKIN, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Where do you live, Mr. Wilkin?
A. On the C. H. & D. Railroad.
Q. 2. Up here in North Dayton?
A. North Dayton; neighbor to John Biersack; this side of him about four or five squares.
Q. 3. Did you live up there at the time of this big flood in March, 1913?
A. Yes sir, I lived the same place sixteen or seventeen years?
Q. 4. Did you ever have any bigger flood up there?

Objected to.

A. No.
Q. 5. Do you remember of a carload of poultry that was side-tracked up there near the coal chute at the time of the flood?
A. Yes sir, straight from my ground.
Q. 6. Pretty nearly opposite where you live?
A. Yes sir, just straight of my ground.
Q. 7. Did you see a man in charge of it, a Mr. Shipley?
A. No. One person get a load of chickens out and fet down town and they changed their mind and they get of me one load of corn, twenty bushels——

Objected to.

In the car, and twenty bushels they sent in town.

Answer objected to.

Q. 8. Now what I asked you about was the man that was in charge of the car, the man that was looking after those chickens?
A. Yes sir.
Q. 9. Did he ever come to your place?
A. That fellow what was in the car?
142 Q. 10. Yes.
A. No, my neighbor man, Nies was out there.
Q. 11. Did he ever go to you to get feed for his chickens?

Objected to.

A. No.
Q. 12. What did you do, if anything, about moving the chickens when they were unloaded?

Objected to.

A. No, I moved no chickens.
Q. 13. You didn't?
A. No, just hauled some corn.
Q. 14. Just hauled some corn for them?
A. Yes, one load in the car—they feed it.
Q. 15. Who came for you to help with the team?
A. The soldiers came after me. I got two horses and one was sick and couldn't get them out of the stable—the other one took out, the small horse anyhow.

It is moved to strike out the answer.

Q. 16. Mr. Wilkin, do you talk German or English most?
A. Oh, I talk German too.
Q. 17. Do you find it hard to understand us here at times?
A. No.
Q. 18. You understand all right, do you?
A. Yes sir, I talk not plain.

Cross-examination waived.

*Deposition of Edward Ladger.*

EDWARD LADGER, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. What is your name?
A. Edward Ladger.
Q. 2. What is your business?
A. Supervisor C. H. & D.

Q. 3. Where do you live?

A. 1318 East May Street.

Q. 4. I believe you said you were supervisor on the C. H. & D. Now in order that the Court may know, tell us what the business of supervisor is.

A. He has charge of the track and roadbed, charge of the
143 section foreman and charge of work in regard to the maintenance of way.

Q. 5. What part of the C. H. & D. road was your district at the time of this flood of March, 1913, if you worked in that capacity at the time?

A. I had charge From Wapak to the mile post 29, this side of Hamilton.

Q. 6. That is how many miles?

A. About a hundred and eighteen miles, including sidings.

Q. 7. Does that include the part of the line of the C. H. & D. from Middletown through, Dayton, up through the Miami valley, through Troy and Pequot?

A. Yes.

Q. 8. And Sidney and Wapakoneta?

A. Yes.

Q. 9. Where were you at the time this high water came into Dayton on the 25th of March, 1913?

A. I was up at what is known as the gravel pit, towards Dayton, on the hill there. Myself and the train master were marooned up there from Monday night until Friday at noon.

Q. 10. Now during the day of Monday, the 24th, was the railroad operated as usual until evening?

A. Yes sir.

Q. 11. As I understand you, the flood came on that Monday night?

A. That night, about—well, Number 10 comes in here about 7:25—she is due here. I was at Sidney that day and came back on Number 3, and the section foreman flagged Number 3 at mile post number 65, Patterson's Bluff, mile post 65. So I got off and walked around ahead of the engine and looked at the flood and told them they could get through that flood; they came on in Dayton. I told Mr. Ruhl, the trainsmaster, when I got in, his family was on the train.

What he said is objected to.

Q. 12. Go ahead and tell us what you saw.

A. Well, we got some sand there to make repairs. We had a washout here during the time—there was a freight train came up there, turned back into the gravel pit. I flagged train Number 10 and she came back into Dayton, to the Union Depot. That was the last train that used that track for about three weeks.

Q. 13. On the night of Monday, March 24th, was it raining that night or not?

144 A. Rained hard all day and all night.

Q. 14. Rained hard all day and night?

A. Yes sir.

Q. 15. How long did you say that you had to stay in North Dayton after the flood came?

Objected to.

A. Well we was there all Monday night till Friday at noon. Left there Friday morning and got in here about one o'clock. Had to walk—came around into town.

Q. 16. And did you find much water in the down town part of the City of Dayton at that time?

Objected to.

A. Yes there was right smart water in places.

Q. 17. When did you first go over the track of the Cincinnati, Hamilton and Dayton through the city after the flood?

Objected to.

A. We went up and made an inspection of the track between Third Street and the coal dock in north Dayton Friday evening.

Q. 18. And how soon after that did you go over the rest of the tracks on the main line in the vicinity of Dayton?

A. I worked in that vicinity maybe ten or twelve days—hired all the men we could find.

Q. 19. What effect if any, had this flood or did it have at that time on the tracks of the Cincinnati, Hamilton and Dayton railroad?

Objected to.

A. Well about twenty one or two miles of track were washed out between Piqua and Hamilton.

Q. 20. And here through the city of Dayton, where the water had been deep, I will ask you to state if any rubbish or obstructions of any sort, were left by the water?

Objected to.

A. Yes, the track was covered all the way from Third street north to as far as Leo street with timbers, horses and dead stock and rubbish of all kinds.

Q. 21. What was the effect on the bridges north of Dayton, on the part of the road that you were looking after, as you have stated?

Objected to.

A. The bridges number one and two was filled with timber and and rubbish.

Q. 22. What stream do they cross?

145 A. Cross the Madriver and canal. Number one bridge is over the canal and the number — over the Madriver.

Q. 23. Is that just north of Dayton?

A. Yes sir, right here in between Third and Kowee Streets—and bridge number three, we had cars of coal on top of the bridge—it

washed the bank out on both sides, and had to build a temporary track in there to get across on.

Q. 24. What stream did that cross?

A. The Great Miami.

Q. 25. How far north of Dayton is that?

A. That is about three miles north.

Q. 26. How long was it, Mr. Ladger, from the time this flood water came up here on the morning of March 25, 1913, until the C. H. & D. could be operated through from Dayton north?

Objected to.

A. I couldn't just say, but I think it was along about three weeks.

Q. 27. About three weeks?

A. Yes—we opened up north, at the north end, opened from Dayton north before we did from Dayton south.

Q. 28. And you say that during three weeks the Cincinnati, Hamilton and Dayton railroad—that no traffie could be moved from Dayton north, and that it also was not in operation from Dayton south?

A. No.

Q. 29. Towards Hamilton and Cincinnati?

A. It must have been six or eight weeks.

Objected to.

Q. 30. Are you familiar with the Big Four and Pennsylvania Railroad through Dayton?

A. Yes sir.

Q. 31. Was the operation of those railroads interrupted by this flood at the same time?

Objected to.

A. Yes sir.

Q. 32. What is your age Mr. Ladger?

A. Forty five years old.

Q. 33. How long have you lived in Dayton?

A. I have only lived in Dayton about three years.

Q. 34. How long have you worked for the C. H. & D. railroad?

A. Going on twenty four years.

Q. 35. How long have you known this Miami Valley and
146 the country between Hamilton, say, and on up through Dayton and Troy and Piqua and Sidney?

A. Well about that length of time—about twenty four years.

Q. 36. Have you ever known any larger flood than this flood of March 1913?

A. No sir, I think not—nobody else.

Q. 37. While you were in Dayton, here in Dayton at the time of the flood, I will ask you to state if you observed what public authorities had charge of Dayton and vicinity and the distribution of food supplies?

Objected to.

A. The State military and the Red Cross I think.

Cross-examination.

By Mr. Gilbert:

Q. 1. You answered Mr. Dick that traffic was interrupted during the high water on the Big Four and Pennsylvania?

A. Yes sir.

Q. 2. Was it interrupted so long on those lines as it was on the C. H. & D.?

A. No—I think the Pennsylvania got their trains through first—then the Big Four and the C. H. & D. got through about the same time. The Big Four had built a new track, a new roadbed between Middletown and Miamisburg.

Q. 3. It was not but a few days?

A. They built a road to Middletown and afterwards got back on the old roadbed again.

Q. 4. The Pennsylvania wasn't interrupted more than a week or ten days?

A. No, I don't think it was—possibly that length of time.

Q. 5. Just about a week wasn't it?

A. Yes sir.

Q. 6. Now the C. H. & D. north from Dayton was only interrupted until the 9th day of April, wasn't it?

A. I couldn't tell you just exactly what time it was.

Q. 7. You know Mr. D. L. Fleming?

A. Yes sir.

Q. 8. What position did he hold at the time of the high water here?

A. He was chief clerk of the superintendent.

Q. 9. Would he be in position to know what time traffic was resumed on the north end of the line?

A. Well he wouldn't be any more than anybody else un-
147 less he has the train sheet. The train sheets would tell you exactly.

Q. 10. If he stated it was on the 9th day of April in the examination here as a witness, would you say that was correct?

A. I know that the first train that went north after we got started was a special train with the President, Mr. Willard, and third vice president, Mr. Thompson. They made the first trip there after we made the fill. What date it was, I couldn't tell you. The train sheet would tell you that.

Q. 11. What is the distance from North Dayton to the Nickel Plate railroad?

A. Well, I think Dayton is sixty miles from Cincinnati, Liepsic Junction about a hundred and sixty, about a hundred and sixty-five—about a hundred miles, I guess.

Q. 12. You strike the Nickel Plate at Liepsic Junction?

A. Yes sir, maybe a hundred or a hundred and ten miles.

Redirect examination.

By Mr. Dick:

Q. 1. Mr. Ladger, in going from Dayton to the connection with the Nickel Plate at Liepsic Junction, north of Lima, which you say is a distance of a hundred to a hundred and ten miles, would you cross any of the streams or bridges that had been washed out in making that run?

Objected to.

A. Yes sir.

Q. 2. Does that include the bridge across the Madriver, the Ohio canal and the Miami River that you had reference to in your testimony?

A. Yes sir, we had to cross the Miami River at Troy. We had two piers washed out of that bridge over the great Miami River at Troy.

148 *Deposition of E. A. Dickson.*

EVERETT ALVIN DICKSON, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. State your name to the reporter.

A. Everett Alvin Dickson.

Q. 2. Where do you live Mr. Dickson?

A. Clay and Cass Streets in Dayton.

Q. 3. Dayton, Ohio?

A. Yes sir.

Q. 4. And what connection if any, have you with the Cincinnati, Hamilton and Dayton Railway Company?

A. Assistant chief train dispatcher.

Q. 5. In that capacity have you anything to do with the original records or train sheets, showing the time of all trains passing over the Cincinnati, Hamilton and Dayton Railroad on each day, and the hours at which they arrive and depart at telegraph stations?

A. Well I couldn't answer that directly. The train dispatchers are the ones in direct charge of the movements of trains, and the movements are supervised by both the chief dispatcher and myself.

Q. 6. What I want to get at is, have you access now to those records now—those train sheets?

A. Yes sir, I have those.

Q. 7. Have you any of them now in your possession?

A. Yes sir.

Q. 8. Were you here in Dayton in March, 1913, at the time of the flood?

A. Yes sir.

Q. —. Do you remember the time that the train, first 94 left Cincinnati that day?

A. Why the time as recorded on the train sheet shows 5:45 P. M.

Q. 10. Well the testimony of a witness here today was that that train left Cincinnati between five and six o'clock on the 24th. I will ask you if at that time, Mr. Dixon, the C. H. & D. railroad, passing from Cincinnati north through Dayton and Lima and Liepsic Junction, to the connection with the Nickel Plate railroad, was in operation as usual?

A. Yes sir—to the best of my knowledge trains were operating as usual at that time that day.

149 Q. 11. Do you remember of the flood water coming up into Dayton the first day the 25th?

A. Yes sir.

Q. 12. Now from that time on, after the 25th, when were trains first operated again from north Dayton through to Lima and Liepsic Junction?

(Witness looks at paper.)

A. The first train leaving Dayton was passenger train number 4, 4:20 P. M. April 6th, running from Dayton to Toledo.

Q. 13. Dayton to what?

A. Toledo.

Q. 14. Now I will ask you whether or not the line of the Cincinnati, Hamilton and Dayton Railroad from Dayton south toward Hamilton and Cincinnati was open after the flood before or after the line north?

Objected to.

A. Afterward.

Q. 15. Are you acquainted in a general way Mr. Dickson, with the line of the Big Four Railroad passing from Columbus to Dayton and towards Cincinnati, and the Pennsylvania from Columbus and Xenia west through Dayton towards Richmond and Indianapolis?

A. Only in a general way.

Q. 16. You know nothing about those lines, to know whether their operation was interrupted during this flood, commencing the 25th of March?

A. I have positive knowledge that their operations were ceased through the vicinity of Dayton during that time.

Q. 17. That is all I am asking you about.

A. Yes sir.

Q. 18. You know that yourself?

A. Yes, I know that from my positive knowledge and observation, being on the ground.

Q. 19. Do you know if the Pennsylvania, or Panhandle as it is sometimes called, has a bridge across the great Miami in the neighborhood of Dayton, as it passes west toward Richmond?

A. The Pennsylvania lines?

Q. 20. Yes.

A. As to that I couldn't say. The only knowledge I had of where

they crossed the Miami river is on the joint track at south Dayton here.

Q. 21. And is that the bridge from south Dayton over towards Miamisburg?

150 A. It is the bridge between Union Station at Dayton and what we call south Dayton.

Q. 22. South Dayton?

A. Yes—it is the entrance to Dayton as we call it.

Q. 23. Well then I understand you that the Pennsylvania used the same bridge in going out of the city towards Richmond that the C. H. & D. railroad uses in going south from Dayton towards Hamilton?

Objected to.

A. Yes sir, they both used the same bridge.

Q. 24. Well was that bridge damaged, or traffic across it interrupted during this flood of March, 1913?

Objected to.

A. Yes sir, the bridge was washed away.

Q. 25. Do you remember about how long that bridge was—how long it was before that bridge was repaired so trains could cross?

Objected to.

A. Not to give accurate dates—but it was over two weeks I am positive.

Cross-examination.

By Mr. Gilbert:

Q. 1. What you said was that you are assistant chief train dispatcher?

A. Yes sir.

Q. 2. And in transporting this car of poultry from north Dayton to the Nickel Plate, you would go north from Dayton over the C. H. & D. how many miles?

A. Go north to Liepsic Junction, to the best of my knowledge off hand it is in the vicinity of 95 miles.

Q. 3. Toledo, that you mentioned is beyond Liepsic?

A. Yes sir.

Q. 4. You said that traffic was resumed on the north end of the C. H. & D., according to your recollection on April 6th?

A. April 6th passenger train traffic was resumed.

Q. 5. April 6th, 1913?

A. Yes sir.

Q. 6. You also said I believe, that the traffic on the Pennsylvania was not interrupted so long as it was on the C. H. & D.?

A. No, I didn't. I don't know how long traffic on the Pennsylvania was interrupted, but I know that it was interrupted during that period—what length of time I don't know.

151 Q. 7. It was only for a few days wasn't it?

A. Well I don't know.

Q. 8. Four or five or six days, something like that?

A. On the Pennsylvania?

Q. 9. Yes.

A. Well I don't know that—I know that during the time that our road was out of commission here through Dayton, the Pennsylvania lines were, to the best of my knowledge.

Q. 10. You don't think they resumed here before you did?

A. Not south of here, I am sure.

Q. 11. I don't mean south—I mean north.

A. Well, what time they resumed operations after the flood, I am not positive, but it was several days—I know that.

Q. 12. Now how long were they delayed in their operation to the north?

A. The Pennsylvania lines?

Q. 13. Yes.

A. Well, I am not positive as to any date.

Q. 14. What is your best judgment?

A. Well, I would say probably between April 2nd and 5th—somewhere in there.

Q. 15. This car of poultry was routed north, was it not?

A. Yes sir, as I understand it was routed north.

Redirect examination.

By Mr. Dick:

Q. 1. Mr. Dickson, was there any way the Pennsylvania could resume operations through Dayton until this bridge in the joint tracks just south of the Dayton Union Depot was repaired?

A. There was no way that they could resume business—through business, but they may have been able to do some operating out north of town.

Q. 2. Out towards Xenia?

A. Yes, out in that direction. Of course, what the conditions were out there, I don't know.

Q. 3. You have said to Mr. Gilbert that the first passenger train was run north from Dayton and passenger traffic was resumed on April 6th; will you tell us when freight traffic was resumed on the C. H. & D. Railroad between Dayton and points north of Lima and Liepsic Junction, towards Toledo?

Objected to.

152 A. I couldn't tell you the exact date that freight traffic was resumed—it was only slightly on high class commodities, to the best of my knowledge, it was somewhere in the neighborhood of the 8th *of* 10th of April, a couple of days after passenger traffic had been restored.

(By Mr. Gilbert:)

Q. You mean by high class commodities that freight traffic was

resumed on about the 8th of April, such as poultry and other perishable stuff?

A. Yes sir, perishable stuff.

*Deposition of H. F. Alps.*

H. F. Alps, of lawful age, being by me sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state you- name, please?
A. H. F. Alps.
Q. 2. And where do you live Mr. Alps?
A. I live in Dayton.
Q. 3. What is your business?
A. Local forecaster with the U. S. Weather Bureau.
Q. 4. In the employ of the United States Government?
A. Yes sir.
Q. 5. Were you so employed in the City of Dayton at the time of the flood in the latter part of March, 1913?
A. Yes sir.
Q. 6. And in that capacity, did you make any observations and compile any data with reference to the nature and extent of that flood?

Mr. Gilbert: I object to the testimony of the weather man—his testimony consists of the depth of the water, and so forth—we don't think that is material.

Mr. Dick: We think it will show beyond contradiction that it was the kind of a storm that the defendant would have no opportunity to guard against.

The Court: I suppose it is admitted on both sides that it was an unprecedented flood—I have repeatedly stated that your own admissions almost supersede the necessity of proving the flood—however, you may prove it. I can see how it might be competent for both sides, in case it should be contended that it was not an overwhelming flood.

Mr. Dick: If Mr. Gilbert will admit that this flood was an
153 act of God and such a flood as the defendant could not be expected to guard against, we will introduce no more evidence on that subject.

Mr. Gilbert: All floods are acts of God.

The Court: There is no doubt about that.

Mr. Gilbert: I think this witness will state that the water reached a depth of about seven feet.

Mr. Dick: Unless he wants a clear cut admission or stipulation, I prefer to continue reading the depositions.

A. Yes sir.

Q. 7. Do you remember, Mr. Alps, what day and about what time of the day it was that the water got over the top of the levees and came up into the City of Dayton?

A. Yes sir—I took measurements and noted the time that the water went over the levees and the approximate time that the water reached the streets about this city.

Q. 8. And what was that time and what date?

Objected to.

A. It was Tuesday morning, March 25th, 1913—the water first overtopped the levee about 5 A. M. and of course, immediately, reached some of the streets in the lower sections of the city and the water reached some of the streets in the business portion of the city, we will say at the corner of Main Street and Fourth Street, or Main Street and Third Street, approximately at 9 A. M.

Q. 9. And what time in the flood, about, did it reach its greatest depth?

Objected to.

A. The rise in the water was very rapid in the early morning and from the time it overtopped the levees, began to run over the levees until it reached the streets within the business section at the center about 9 A. M. and from my observations of the rapid rise, I would state that the rapid rise continued until about 11 A. M. and after that the rise was very slow, perhaps an engineer would say, gradually dropping off, until about midnight of the 25th, when the highest point was reached. I took those measurements myself, measurements of the height of the water—was taking measurements at all times and as near as I could figure, the highest water was reached about midnight of the 25th.

Q. 10. At that time about how deep was the water in the principal streets of the City of Dayton in the vicinity of the Algonquin
154 Hotel and this Schwind building near it, where these depositions are being taken?

Objected to.

A. Several measurements were taken of the high water mark, and some measurements were made in the city of the high water mark and I verified a good many of those measurements by the high water marks which were plainly left on the brick walls at various places throughout the city. Some of them can be seen now. I verified some of those measurements and I would say at the Algonquin Hotel, the water at its highest was about 9 or 9½ feet, and at this building, which is called the Schwind building, I believe, the depth of the water would not be far from what it was at the Algonquin—it is nearly level—about 9 or 9.5, possibly 10 feet—not more than 10 feet.

Q. 11. And about what was the depth of the water on the tracks of these railroad companies in the Union Depot in Dayton where the

Cincinnati, Hamilton and Dayton, Pennsylvania and Big Four trains come into the city?

Objected to.

A. I have data in my office from which I could give very accurately. Now I don't know whether it—some of these things I don't remember—it has been quite a while since I studied these flood matters, and it may be given on the map which is published in my report, of course, of this.

Q. 12. Can you refresh your recollection from your map here, please, approximately?

(Map is shown to witness, being map published by United States Government.)

A. This is the United States report of the flood in 1913. I don't just get the location. I guess this is the depot about in there (indicating). It is given at 12 feet, if that is the location—it is given there as 12 feet, but from off hand observation, I would say 12 or 15 feet, although my memory is not so fresh about that as it is about some other places. I have the elevation of the depot down there (at the office) and of course if I had that I could get at it very closely, because the water was 29¾ feet on the river gauge at Main street, and that at the depot would be on a level below that. I have the elevation of the river gauge, and of course have the elevation at the depot there, and that would give it there at least within a foot.

(It is moved to strike out the answer of witness.)

Q. 13. What rivers are there at Dayton, Mr. Alps?

155 A. The Great Miami, Madriver and Stillwater river discharge there. The Great Miami River passes through Dayton and Madriver and Stillwater river discharge into the Miami River within the city limits—the north part of Dayton, I may say.

Q. 14. Now about how far to the north of the Union Station at Dayton is it across to the Great Miami river?

A. About how far north from the Union Station?

Q. 15. Yes, going north before you get to the river.

A. Well, it is—I could give that in blocks, I suppose?

Q. 16. Well, either in blocks or approximate fraction of a mile.

A. It is about eight blocks.

Q. 17. Do you keep a gauge showing the height of the water of the river at Dayton, Ohio, from time to time, Mr. Alps?

A. Yes sir, we keep and we have a river gauge and we keep a record—we take readings of the gauge each day.

Q. 18. During this flood that commenced on the morning of March 25th, 1913, what was the highest reading of that gauge?

Objected to.

A. 29.3 feet.

Q. 19. Do you remember, Mr. Alps, what the highest known reading of that gauge was previous to that flood?

Objected to.

A. 21.3 was the highest, I think, on the river gauge previous to that, and that was in 1866. I said 29.3. According to my record it was 29 feet, the highest water for March of 1913. The Morgan engineers made it 29.3. I sometimes get them mixed but according to my reading it was 29 feet.

Q. 20. And I understand you to say that the highest known previous reading was 21.3?

A. Yes sir.

Q. 21. Then am I correct in computing that this flood of 1913 was 7.7 feet higher than any other known flood?

Objected to.

A. Yes sir, 7.7 feet higher.

Q. 22. About what channel, or valley, has the Great Miami River as it flows through Dayton? That is, what kind of a river bed and channel is there, how deep and how wide?

Objected to.

A. The river at low gauge—on Main Street bridge it is 588 feet wide.

156 Q. 23. And what is the depth of that bed of 588 feet below the bridge?

Objected to.

A. Well, it is about 22 feet deep at its greatest depth in this place, that is, below the levee. The arch of the bridge might be a little more. There might be a little more depth than that; but it is about 22 feet below the levee.

Q. 24. Now during the time of this great flood of March 25th, 1913 how great a width of land did this flood cover from one side of it to the other through Dayton?

Objected to.

A. Well, according to my calculations, which were only approximate as to distance, but which were correct as to the areas covered by the water, the width in an easterly and westerly direction was about three miles, and the length in a northerly and southerly direction was about four miles.

Q. 25. What was the character of the rainfall, Professor Alps, immediately preceding the rapid rise of the water, or about that time?

Objected to.

A. It was very heavy.

Q. 26. And from your study of the situation and from the government reports, I will ask you to state whether that was more or less widely diffused over the basin drained by the Great Miami River, than an ordinary rainfall?

Objected to.

A. It was a heavier rainfall for the entire watershed than has been known since the records have been kept.

Q. 27. Can you tell us, Professor Alps, what the effect of this flood was upon the transportation business through Dayton, as conducted by the railroads passing through the city, the steam railroads, such as the Cincinnati, Hamilton and Dayton, the Pennsylvania and Big Four roads?

A. Well, of course, we all know that it tied up everything.

Q. 28. Yes Professor, we know that perfectly here, but I want to get at it for the information of the Court out at East St. Louis that will try this case.

A. I don't know that I could say very much more about that only that the trains were stalled, and that there was no movement of trains through here for some time, several days after the flood. There was no movement, of course, the morning of the high water, Tuesday morning, the 25th. The trains were simply stopped and there was no movement for several days, excepting I believe,
157 that, is no movement through the city. The little road, of course, that comes in from the south and comes up, I think near the N. C. R. on high ground, did some business in hauling in provisions and taking out some persons.

Q. 29. And what was the effect upon the bridges across the Great Miami of the railroads?

Objected to.

A. The railroad bridge was washed out, three or four spans of the railroad bridge were washed out.

Q. 30. And I will ask you if you refer to this bridge used by the —— Union bridge, used by the railroads, that is just a few block-below the Union Station?

A. I refer to what we call here, I believe, the steel girder bridge that is used by the Pennsylvania lines and I believe the C. H. & D. and Big Four. It is over near Fifth Street.

Q. 31. And is used by any train that passes in a westerly direction from the Union Depot?

A. Yes sir.

Q. 32. And what was the effect upon human life and property within the flooded district?

Objected to.

A. Well, my own opinion is that is—I don't know whether this is just to the point or not—but I believe that it was the most severe flood that ever visited a city of its size or a larger city in the inland portion of the United States.

Q. 33. There was some loss of life, then in that flood?

A. Yes, sir, there was a loss of about two hundred lives that they know of, immediately at the time of the flood, beside the loss of life which resulted from exposure during the flood, which is not yet ended.

Last question and answer are objected to.

Mr. Gilbert: We renew our objection to that.

Mr. Dick: We would like to have all of the testimony of this witness.

The Court: He objects to going into the effect on human life—all of us know that unfortunately a lot of people lost their lives—I don't see where that is material in this case at all, but he may proceed.

(Witness corrects answer as follows:)

A. It is known that ninety-six persons were drowned.

Q. 34. And that the losses total about $75,000,000?

A. Yes sir. This is, of course, a conservative report. I took that from the coroner. That is the only thing I had at that time.

158 We have all thought that there were more than that, but we have tried to be accuraate; we can't go beyond the coroner.

We know the people of Dayton have tried to keep that down. They don't want this bad advertisement. Of course there have been more people died since the flood from the exposure than there were drowned at the time.

*Deposition of R. M. Robinson.*

R. M. ROBINSON, of lawful age, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name?

A. R. M. Robinson.

Q. 2. And where you live?

A. 1023 North Main Street, Dayton, Ohio.

Q. 3. And what is your business here?

A. At the present time I am traffic manager of the Greater Dayton Association.

Q. 4. And what were you in March, 1913, at the time of the Dayton flood?

A. Traffic manager of the Dayton Chamber of Commerce.

Q. 5. Do you remember when it was that the flood came up into Dayton—what day?

A. March 25th, 1913.

Q. 6. And what was the effect on business and the conducting of transportation by the steam railroads through Dayton?

The Court: Aren't all of your witnesses that follow merely cumulative?

Mr. Dick: Except this—if Your Honor will notice, we are meeting a declaration under which anything would be admissible—there was some intimation that these chickens might have been moved out by some other railroad and this witness will say that the other roads were impassable and could not be used.

A. It demoralized transportation facilities with the exception of via

the Pennsylvania, which got into Dayton from the east. The relief was from the east, and I think the Big Four eventually got in from the east. That was the second line that got in. The facilities south, with the exception of the D. L. & C.—the Dayton, Lebanon and Cincinnati railroad which operates through the south end,
159 through the hills, past the Cash Register plant—that was another avenue that was opened out immediately after the water had come in, and during the time that it was in. The bridge was out over the Miami River and they could not get south, nor could they get from there. If I remember correctly, the right of way of both the Big Four and C. H. & D. was out.

Q. 7. What effect did this flood have as bearing on the interchange of traffic between railroads like the C. H. & D. and this little D. L. & C. line up in the hills?

Objected to.

A. The connection with the D. L. & C. and the C. H. & D. east of Dayton was intact, but that was only for northbound traffic, and in connection with the line of the C. H. & D. that runs southeast from Dayton down to Ironton.

Q. 8. That had no connection then, with the line that goes north from Dayton towards Troy, Piqua and Lima?

Objected to.

A. Only through the Dayton Terminal Switch—that is located a little over two miles from Lebanon Junction. This connection was within the limits of the flood.

Q. 9. And I will ask you, Mr. Robinson, whether or not that is also true of the Pan Handle line running east from Dayton towards Xenia and Columbus, with reference to any interchange or connection with the Cincinnati, Hamilton and Dayton line north from Dayton towards Lima and Toledo?

A. The only connection that the Pennsylvania has with the C. H. & D. is at the joint track just south of Third Street—that is, east of Main about half a mile, and that also was in the flood zone, and there was not any interchange of traffic between the C. H. & D. and Pennsylvania for a period of at least two weeks.

Q. 10. Have you any way of recalling, Mr. Robinson, how soon the interchange of traffic between the different railroads in the city of Dayton was resumed after the flood waters receded from that great flood?

Objected to.

A. As traffic manager of the commercial organization here, I took hold of the department again just as soon as I could be relieved from flood duty in my own particular section. I live in Riverdale, and I worked out there for two weeks, approximately so, and contemplating the resumption of business, I reported at the office—it was either Thursday, the 10th, or Friday, the 11th of April, and called upon the executive of the railroad companies to meet with me on Sun-

160 day, April 13th. Up to that time there had not been any transportation operations to speak of, except possibly to clear away the debris and get the sidetrack and main tracks within the corporate limits in shape so that they would know where they were. But that was on the 13th day of April, and they did not resume interchange of freight until sometime after that—that is, between the C. H. & D. and the other lines. The Big Four resumed their interchange before the C. H. & D. did.

Q. 11. Could you say, Mr. Robinson, approximately how deep the water was at the height of the flood where the three railroads named, the Cincinnati, Hamilton and Dayton, the Big Four, and the Pennsylvania lines passed through the flooded district from the part of the City of Dayton that was flooded in the neighborhood of the Union Depot?

Objected to.

A. I should say approximately, it was between eight and nine feet at the Union Station. It varied, of course, in the several sections of the City. I live within a square and a half of the flood limit, inside of the flood limit, and we had in that section, in front of my home, about twelve feet.

Motion to strike out the answer.

Q. 12. What was the effect, Mr. Robinson, in the way of carrying any debris or obstructions on the railroad track, if you observed, when the waters receded?

A. Well, the buildings, that is frame buildings of all descriptions, were lodged wherever they would find a lodging place, you might say. Cars were overturned, platforms were washed out and the C. H. & D. freight receiving station was—that was of brick construction—was razed entirely—ripped down by debris hitting it and knocking out the supports.

Q. 13. What amount of damage was done in the city approximately to property, Mr. Robinson?

Objected to.

A. Well, I don't know whether I received anything on that subject or not. I don't believe I would care to answer that particular question. I saw with my own eyes, houses going out. Within a period of ten minutes, I saw in my own section of town, three houses going to pieces against brick houses.

Q. 14. That is what I wanted to get at—whether it was large or small—not an estimate in dollars.

A. I couldn't give you an estimate in dollars—in our section also, there was almost a block of residences washed out.

Q. 15. As bearing on the extent of this flood and its sud-
161 denness, would you be prepared to say about how many horses were drowned in it?

Objected to.

Mr. Gilbert: We renew our objection to that.
The Court: I don't think that is material.

Q. 16. Now during this flood, who took charge of affairs here in Dayton and Montgomery County, the ordinary civil authorities or any branch of the executive department of the State of Ohio?

Objected to.
Mr. Gilbert: We renew our objection to that.
The Court: He may answer.

A. The civil authorities did not take charge. The Citizens' Relief committee, or just a tentative committee, valled upon the State troops to protect property and lives, and to render such assistance as they might and after a while that committee was giving a legal status, and in conjunction with the military, continued the rehabilitation and cleaning up and straightening things up. The military for weeks, I don't just recall the limit, performed all the police duties, and so forth.

Q. 17. In Ohio, is that branch of the military what is known as the Ohio National Guard?
A. Yes sir, that is right.

Objected to.

Q. 18. Who took charge of the supplies of food and their distribution immediately after the water arose as you have referred to?

Objected to.

A. The military.

*Deposition of Judge O. B. Brown.*

Judge O. B. BROWN of lawful age being by me first duly sworn to tell the truth the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mr. Dick:

Judge Brown: I was counsel for Mr. Begg for half a day I do not want to testify to anything that would involve that.
Mr. Dick: Anything you got from Mr. Begg would be privileged of course.

Q. 1. State your name.
A. O. B. Brown.
162 Q. 2. Judge, your residence is here in the city of Dayton?
A. Yes sir.
Q. 3. And you are an attorney at this bar?
A. A member of the bar—have been since 1878.
Q. 4. Have been since 1878?
A. Yes sir.

Q. 5. You were living here at the time of the great flood in March 1913?

A. I was.

Q. 6. And what part of the city did you reside in Judge?

A. I lived at 115 west Second Street, near the corner of Ludlow the first door west of the First Presbyterian Church.

Q. 7. Is that a part of the city that was affected by the flood?

A. It was, five feet of water in my parlor.

Objected to.

Q. 8. How extensive was the flood in the city of Dayton, I mean to an observer—how wide was the flooded territory and how extensive?

Objected to.

A. We had a flooded district of about twelve to fifteen square miles in the city.

Q. 9. And can you tell us what effect the flood had for a time in the way of interrupting traffic on the railroads through Dayton, such as the Cincinnati, Hamilton and Dayton and Pennsylvania and Big Four roads?

Objected to.

A. Traffic was entirely suspended for sometime, from the 25th day of March, I think for two weeks at least.

Q. 10. And I will ask you Judge who had charge of the affairs in the city during the height of that flood, the civil authorities or the military?

Objected to.

A. The military authorities under command of George H. Wood, who was adjutant general of the State, and also in charge of the military district.

Q. 11. And I will ask you to state if anyone took charge of the supplies of food and the like, who it was, during that time?

Objected to.

A. Everything in the nature of food supplies was taken by the military at that time, all provisions in the grocery stores or whatever found, on the railroads or any other place.

Q. 12. And how were they used?

163 Objected to.

A. They were used for the benefit of the people of the vicinity. We were all in the bread line—we couldn't buy anything.

Q. 13. That is what I would like you to state for the information of the Court, what your own personal experience was, as a citizen in that line.

Objected to.

A. I couldn't buy anything for my family, and was compelled to be in the bread line with everyone in Dayton. They even took the grocery stores that were outside of the flooded district and took possession of them for distribution among the citizens.

Q. 14. For distribution among the citizens that were affected by the flood?

A. Yes sir—not only those that were affected by the flood, whether in the flooded district or out of it—nobody could get supplies in the whole city without they got it through the military authorities.

Q. 15. And Judge, can you tell us if you know, what was done in the way of taking possession by the military authorities of any live stock or freight in the custody of the railroads within the district, that could be converted into food?

Objected to.

A. I know that there were provisions taken off of the cars. I do not care——

Q. 16. I am just asking you in a general way.

A. In a general way I know that there were some taken out of the car.

Q. 17. Not about a specific case.

A. Yes.

Q. 18. If any such food stuff was taken, I will ask you if such food was distributed by the military authorities in the same way as other food stuff, such as were found in the groceries, as you have described.

A. Yes sir, everything that was taken was distributed for the benefit of the people of the district. I know this from being on a committee which audited the accounts of the officers and men who composed Dayton Citizens' Relief Committee.

Q. 19. Was this flood accompanied by any loss of human life, so far as your observation went?

Objected to.

A. There was a direct loss of—I can't tell you exactly. I
164 would know accurately at my office—about one hundred directly.

Q. 20. About one hundred directly?

A. Yes, and quite a number who died as the direct result, amounting to nearly as many, and about thirty sent to the insane asylum as the direct result of the flood in this city.

Q. 21. About thirty sent to the insane asylum?

A. Yes sir—I have investigated that, and recently as a member of the Flood Prevention committee, of which I am secretary and counsel, but I do not give those figures accurately because I have no memorandum.

Q. 22. Without undertaking to make any estimate in dollars and cents, was the damage to property in the city large or small on account of that flood?

Objected to.

A. The actual money loss in the city of Dayton was not less than $70,000,000. I have got that accurate too, but I can't tell now.

Q. 23. Could you say about how many people were at least temporarily driven from their homes during the height of the flood, when the water came in on the 25th of March, 1913?

Objected to.

A. A great majority of the people were driven into upper stories and garrets, but there were a large number of people driven from their homes—I can't estimate that.

Q. 24. Do I understand Judge, that you are at present, or have been since the flood a member of any of the committees that are studying this subject of flood prevention, or that have made any special studies of this subject?

Mr. Gilbert: I object to that—I don't see how that is material.

Mr. Dick: It is only for the purpose of showing what kind of a citizen he is.

Mr. Gilbert: His good citizenship is admitted.

The Court: It is admitted that he is a credible witness—it will not be necessary to go into that.

Cross-examination.

By Mr. Gilbert:

Q. 1. Judge Brown, with reference to the time that traffice on the C. H. & D. into or from Dayton was interrupted, it has been stated in this hearing by the assistant train dispatcher that passenger traffic was resumed on April 6th, and freight traffic on April 8th—would you say that that was not correct?

165 A. Oh, I would not say it was not correct. I did not attempt to fix it accurately because my attention had not been called to what I was expected to testify to.

Q. 2. That seemed to be the statement?

A. I think that is about right, from March 25th to April 8th.

Q. 3. Something like ten or twelve days?

A. Let's see—that is about two weeks?

Mr. Dick: That is from the north?

A. Yes—I could state accurately if I had a chance to look at my books.

STATE OF OHIO,
*Montgomery County, ss:*

I, Edward E. Burkhart, a notary public within and for the County of Montgomery and State of Ohio, do hereby certify that the above named witnesses were by me first duly sworn to testify the truth, the whole truth and nothing but the truth, that the above depositions were given by them under oath as aforesaid, were reduced to writing by John Collins, an official stenographer of this County in my presence, that the signatures to said depositions were

waived as per agreement of counsel, and that said depositions were taken at the time and place testified in the annexed notice and agreement.

In testimony whereof I have hereunto set my hand and official seal this 2nd day of May, 1914.

[SEAL.] EDW. E. BURKHART,
*Notary Public in and for Montgomery County, Ohio.*

DEFENDANT'S EXHIBIT 1.

Dayton, Ohio,

April 11, 1914.

My name is Wm. C. Nies. I am thirty two years of age, married, reside at 21 Leonard Street, Dayton, Ohio, and am employed as master mechanic for Dayton Pipe Coupling Works.

During the floods of March, 1913, I lived on R. R. No. 3
166 just west of the C. H. & D. R. R. tracks, and about a quarter of a mile south of the C. H. & D. coal docks in North Dayton. I remember the car of poultry that was in charge of Mr. Thomas Shipley and helped him take care of the car while here and he boarded at our house while here.

Mr. Shipley had enough feed in the car to last the chickens a couple of days after which he bought feed from Mr. Kammer to last them for three days, after which the military authorities took charge of the car. When the military authorities took charge, we had about ten bushels of corn left in the car.

A yard engine came after the car just as soon as they could get through after the flood, but the military officers who were in charge of the car would not let them take it, until they brought an officer along, which they later did, and the car was taken to crossing at Leo St. where it was unloaded by the soldiers and distributed among the people. I do not know what the railroad people wanted to do with the car when they first sent the yard engine after it.

After the military authorities took charge of the car, and also before, both Mr. Shipley and I asked for permission to unload the car and let the chickens run loose in my yard, but they would not let us do so. Where the car first sat the water was up to the floor of the car and I did not start to assist Mr. Shipley until the water went down on Thursday morning. The military authorities came in on Thursday afternoon, but did not take charge of the car until Friday afternoon.

Mr. Shipley gave me all the eggs that had been laid by the chickens en route, which was approximately fifteen dozen. As a further appreciation of what I did to help him, Mr. Beggs of the Collins Produce Company has told me he will place me on the road for them the first opening he has.

(Signed) WM. C. NIES.

The following depositions were then offered in evidence by the defendant.

The caption, reading of which was waived, is as follows:

167 *Stipulation.*

In the District Court of the United States, Eastern District of Illinois, March Term, A. D. 1914.

Number 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

It is hereby agreed by and between the plaintiff, Collins Produce Company, and the defendant, Chicago & Eastern Illinois Railroad Company, that the doposition- of Edward Vollrath and of other witnesses on behalf of the defendant shall be taken in the above cause, upon oral interrogatories before W. L. Monett, a Notary Public, by a stenographer in his office at Rooms 1 and 2, Opera Block, corner of East Mansfield and Walnut Streets, in the City of Bucyrus in the County of Crawford in the State of Ohio, commencing at the hour of nine o'clock A. M. on Tuesday, April 28, 1914; at which time and place it is agreed that the plaintiff may also take the depositions of witnesses in said cause in its behalf on oral interrogatories.

It being understood and agreed by the parties to this suit, that all notices and all legal formalities relative to the taking of such depositions are hereby waived.

Dated this 16th day of April, 1914.

G. GALE GILBERT,
*Attorney for Plaintiff.*
HOMER T. DICK,
*Attorney for Defendant.*

168 *Subpœna.*

STATE OF OHIO,
*County of Crawford, ss:*

To Edward Vollrath and Carl A. Brown, witnesses:

You are hereby ordered to appear before me, a Notary Public in and for said county at the office of Scroggs & Monett Number 2 Opera House Block, in the city of Bucyrus, County of Crawford and State of Ohio, on Tuesday, the 29th day of April, 1914, at nine o'clock A. M. to testify in behalf of the defendant in an action pending in the District Court of the United States Eastern District of Illinois, wherein Collins Produce Company is plaintiff, and Chicago & Eastern Illinois Railroad Company is defendant.

Given this 24th day of April, 1914, under my hand and official seal.

W. L. MONETT,
*Notary Public.*

STATE OF OHIO,
*Crawford County, ss:*

Geo. W. Didie, of Bucyrus, Ohio, being duly sworn, says that he served the above writ by leaving a true copy thereof with Edward Vollrath and with Carl A. Brown, personally on the 25th day of April, 1914.

Affiant further says that he has no interest in said suit.

GEO. W. DIDIE.

Sworn to before me this 25th day of April, 1914.

W. L. MONETT,
*Notary Public.*

Mr. Whitney reads the deposition- as follows:

*Depositions of Carl A. Crown and Edward Vollrath, Taken at Bucyrus, Crawford County, Ohio, on April 28th, 1914, in Accordance with Stipulation Hereto Attached.*

Present:

G. Gale Gilbert, for the plaintiff.
Homer T. Dick, for the defendant.

169 *Deposition of Carl A. Brown.*

CARL A. BROWN, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name, please?
A. Carl A. Brown.
Q. 2. And where do you live?
A. In Bucyrus, Ohio.
Q. 3. Have you any connection with the military department of the State of Ohio known as the Ohio National Guard?
A. Yes sir.
Q. 4. What is that, Captain?
A. Captain commanding Company A, Eighth Ohio Infantry.
Q. 5. And who is the Colonel of that regiment?
A. Colonel Edward Vollrath.
Q. 6. Residing at Bucyrus, Ohio?
A. Yes sir.
Q. 7. Were you in that same position in March, 1913, at the time of the Dayton flood?
A. Yes sir.
Q. 8. I will ask you to state if you went to Dayton in that capacity?
A. Yes sir.

Q. 9. What day did you get there?

A. 28th day of March, 1913.

Q. 10. And state if your Company was assigned to duty in any part of Dayton, and in what part, if it was?

A. We were assigned to the C. H. & D. yards in that locality.

Q. 11. Is that what is known as North Dayton?

A. Well, from hearsay, that is what they called it, North Dayton. That's the only way I know that.

Q. 12. It was North Dayton when you were at Dayton?

A. North Dayton.

Q. 13. Do you remember a carload of poultry that is said to have belonged to the Collins Produce Company, the plaintiff in this case being on the tracks of the C. H. & D. Railway at North Dayton at the time you went there?

A. Yes sir.

Q. 14. And whereabouts did you see that car, if you saw it?

A. It was in a merchandise train that was standing there,
170 about half way between the river and Leo Street, I think it was called.

Q. 15. If you noticed, where was that with reference to a coal chute of the C. H. & D.?

A. That was right next to the river, about half ways between.

Q. 16. Was that car there when you first went on duty there in North Dayton?

A. Yes sir.

Q. 17. And I will ask you to state if you personally saw it?

A. Yes sir.

Q. 18. Did you see a man in charge of that car, the caretaker, a man named Thomas Shipley?

A. I saw a man in charge of it—didn't inquire what his name was.

Q. 19. I will ask you to state if you observed anything as to whether or not any of these chickens were dying when you took charge?

Objected to.

A. I saw a number of dead chickens thrown outside tracks.

Q. 20. I will ask you to state if you heard this man in charge say anything about wanting to be relieved of the custody of the car or get away or anything like that?

Objected to.

A. I don't just recall hearing him say he wanted to get away, but——

Objected to as secondary evidence.

Q. 21. If any reports were made to you in your official capacity as Captain, without repeating the exact words, tell us the purport of what was reported to you?

Objected to.

Mr. Gilbert: We object to what was reported to him.

The Court: If he knows what was done with the car, get down to that.

Q. 22. And what if anything did you notice later on, from day to day, after you got there, with reference to any dead fowls from that car?

Objected to.

A. Dead fowls every day, throwing them out where the car stood.

Q. 23. Did you notice anything as to any disposition that was made of them in getting rid of these dead fowls?

A. No sir.

171 Q. 24. Didn't observe that part?

A. No sir.

Q. 25. Was there any other stock or perishable stuff that you observed in that train beside that there with this car of poultry?

Objected to.

A. Several carload- of hogs.

Q. 26. And do you know what was done with those, if anything, by the military authorities?

Objected to.

A. They were taken out of the train.

Q. 27. Captain, did you observe what became of this car of chickens and poultry?

A. Yes sir.

Q. 28. What was done with it?

Objected to.

A. Given out to the people needing relief.

Q. 29. Was that done by the soldiers taking possession of them or otherwise?

Objected to.

A. Yes sir.

Q. 30. State in your own way who it was took them out and how they were distributed.

A. There were orders from Colonel Vollrath that they should be disposed of in that way. People were sent there and were given out chickens as they needed them, or were supposed to need them, according to the size of the family.

Q. 31. I will ask you to state, Captain, whether or not your particular company of that regiment was the one that was on duty in guarding that merchandise train, including this car of poultry.

Objected to.

A. We were put down there on the 28th day of March and next day

were relieved, and then sent back the following day, and were there from that time on to the morning of the 8th of April.

Q. 32. From what you observed and what was reported to you, did the caretaker of this car remain with the car continuously and give the poultry attention at the time you went there at North Dayton and took charge?

Objected to.

A. The first part he was there pretty steady, but along towards the end he was not there as regularly.

172 Q. 33. Did you notice at any time while you were on duty there a carload of coal in that vicinity being burned?

Objected to.

A. Yes sir.

Q. 34. In that connection, I will ask you to state if you knew of any of the chickens that had been taken from this car being the dead chickens being got rid of by being burned in that coal?

Objected to.

A. Yes sir.

Q. 35. Were you present when any chickens were taken from the car—live chickens?

Objected to.

A. Issued out?

Q. 36. Yes sir.

A. Yes sir, I was there.

Q. 37. What was their condition as far as you observed?

A. Some didn't look very healthy.

Q. 38. From what you observed, had the car been cleaned out that they had been kept in before the chickens were taken from it?

Objected to.

A. It was cleaned out to some extent, but not very much.

Q. 39. Now Captain, this condition that you have spoken of, of the man in charge wanting to get away, did you get that in part from what you heard yourself, or entirely from reports made to you?

Objected to.

A. From both. I was on duty part of the time—my Company was on duty there and I was held responsible for what was done and I was in charge half of the time and the Lieutenant in charge the other half.

Cross-examination.

By Mr. Gilbert:

Q. 1. What is your business?

A. Auctioneer.

Q. 2. When was this car of poultry turned over to the military authorities or taken by them?

A. I don't believe I can give the exact date on that, that is the day it was taken and issued out to the people.

Q. 3. It was not all issued out in one day was it?

A. Two days.

Q. 4. Taken on Monday, 31st day of March, wasn't it?

173 A. Couldn't say that.

Q. 5. Will you state that it was not?

A. No, I will not state that it was not.

Q. 6. Prior to Monday, March 31st, did you ever have a conversation with a man by the name of Thomas Shipley?

A. I don't recall that I did.

Q. 7. You didn't have anything to do with that car of poultry until after the military had taken it in charge, did you?

A. Yes sir.

Q. 8. What?

A. Protecting it.

Q. 9. It was on the tracks of the Railroad Company wasn't it?

A. Yes sir.

Q. 10. You didn't do anything with the poultry before it was taken over by the military, did you?

A. Not more than to protect it.

Q. 11. You stayed there yourself?

A. No sir.

Q. 12. How many times di you see that car before the 31st of March?

A. While we were there I made my round at least twice a day.

Q. 13. That would be two days then if it was taken away on the 31st?

A. That's right.

Q. 14. You don't know very much about this car of poultry except what you saw when they issued it out—you are not a poultry dealer?

A. No sir.

Q. 15. Never shipped any?

A. No sir.

Q. 16. Never had any experience in shipping produce or poultry?

A. No sir.

Q. 17. They were issuing this out for a number of days after it was taken over on the 31st of March?

A. Yes sir.

Q. 18. Most of this you saw after it was moved down to Leo Street?

A. It was standing right at our quarters.

Q. 19. That was after the military had taken——

A. After they had decided to issue it out to the people.

Q. 20. Did they take it or not?

174 A. They did.

Q. 21. What did the railroad people say about that car if anything?

Objected to by Mr. Dick.

A. I only recollect one day they came down with an engine and were going to haul it off—I told them to leave it go until after they had orders from military headquarters.

Q. 22. What were they going to do with it?

A. Said they were going to take it up town to the other military headquarters.

Q. 23. You wanted it kept close to your headquarters, did you?

A. Until I had orders otherwise.

Q. 24. You fellows lived pretty high on that produce after it was issued out?

A. Not any higher than ordinarily.

Q. 25. Have any turkey dinners?

A. Didn't have a mouthful of turkey while I was there.

Redirect examination.

By Mr. Dick:

Q. 1. Captain, is it a fact that the military authorities took possession of all supplies of food stuffs they could find there at Dayton?

A. Yes sir.

Q. 2. Mr. Gilbert asked you if you recall having any talk with Mr. Shipley and in answer you stated that you did not recall any do you mean to say that you had no special acquaintance with the man, or that there was no conversation with him?

A. I don't recall of ever having a conversation with him.

Q. 3. Can you place having seen the man, the man in charge of this car?

A. Yes sir.

Q. 4. That was when he was talking to you or someone else—had you heard him talk in your presence while you were there?

A. I can't say that I did.

Q. 5. Your recollection about that is not distinct at this time?

A. No sir.

Q. 6. Captain, you spoke of arriving at Dayton on the 28th of March—will you tell us how you got to Dayton?

Objected to.

175 A. Went from Bucyrus to Lima, from there to Troy over the C. H. & D. Railroad, from there we marched to Tippecanoe and took the street car to—I can't recall the name of the place—Stop 3 or something like that and from there we marched direct to Dayton.

Q. 7. In the course of that March did you notice what the effect of the flood had been on the C. H. & D. railroad in any place, the line that runs through Dayton north to Lima?

A. Yes sir.

Q. 8. And what was that effect?

Objected to.

A. It was impassable almost for foot, you might say.

Q. 9. And when you finally got to Dayton, in crossing over the river tell us whether or not the bridge had been washed out?

Objected to.

A. Yes sir.
Q. 10. And how did you get across?

Objected to.

A. Into Dayton?
Q. 11. Yes sir.
A. I don't know that I can describe the exact route.
Q. 12. I mean was there any trains crossing the river at that time?
A. No sir.
Q. 13. And in order to get from Bucyrus down to Dayton, about how much of that way did you have to walk or did walk?

Objected to.

A. I judge between eight and ten miles.

Recross-examination.

By Mr. Gilbert:

Q. 1. What is the distance between Bucyrus and Dayton?
A. I don't just know.
Q. 2. Is it one hundred or two hundred and fifty or five hundred miles?
A. Maybe one hundred miles going by way of Lima and down.

(Signed) CARL C. BROWN.

176 *Deposition of E. Vollrath.*

EDWARD VOLLRATH, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dick:

Q. 1. Colonel, will you state your name for the purpose of the record.
A. Edward Vollrath, reside at Bucyrus Ohio; occupation attorney at law; and in my military relation I am in command of the Eighth Ohio Infantry. I was in command of that regiment during the months of March and April, 1913.
Q. 2. That regiment is part of the Ohio National Guard, is it Colonel?
A. Yes sir.
Q. 3. In that capacity did you go to the city of Dayton, Ohio, during the flood the latter part of March, 1913?
A. As my records show, I was ordered to Dayton on the 26th of March, 1913, and got into Dayton on the 28th of March, and I remained there until the 8th of April, when I was relieved.

Q. 4. Can you tell us, Colonel, in what part of the City of Dayton your regiment was placed?

A. Well, I did not have all my command there—the force I commanded was a mixed force, consisting of officers of the Eighth and of the Second and of the Third Ohio Infantry, and companies from the Second and Eight Infantry and I was located in North Dayton—had charge as the military commander of that part of Dayton which was designated at "Zone One."

Q. 5. Do you remember while you were there, of a car of poultry that was sidetracked or a merchandise train on the tracks of the C. H. & D. Railroad?

A. Yes sir, I recall a car of poultry that we found in the yards of the C. H. & D. at North Dayton on our arrival there.

Q. 6. And that was on the 28th of March, I believe?

A. It was on the 28th of March that I got in there, understand me, I don't know whether I observed that car of poultry at that time but I was placed in command on the 28th of March and found it there.

Q. 7. Was that car within the zone of which you had charge?

A. Yes sir.

Q. 8. What did your command do with reference to taking
177 charge of any supplies of food or material that could be converted into food on your arrival, if anything?

Objected to.

With reference to guarding, or preservation or anything—any other steps?

Objected to.

A. It's a little difficult to state at this late date just when certain supplies were taken possession of. The fact is that much of the material in the cars in the yard of the C. H. & D. Railway Company had been appropriated when I got there. There were two car loads of hogs that had been taken out—part of them had been slaughtered when I got there, and other supplies.

(Question read.)

A. (Continued.) As soon as practicable, I acquainted myself with the conditions of affairs relative to these supplies and assumed control of such portions as had not been consumed, for the purpose of preserving and caring for same.

Motion by Mr. Gilbert to strike out answer.

Q. 9. Colonel, in your capacity as commander of that zone, were any reports brought to you as to the condition of this car of poultry and whether or not the poultry was being fed and cared for?

Objected to.

A. My attention was called to the car of poultry that was on the tracks in the C. H. & D. yards in north Dayton. It was reported that a man was in charge of it. I paid no particular attention to

this car, presumably because a man was in charge of it, until about April 3rd—I say 'about'—when a report reached me that the feed for the poultry was exhausted and that the man in charge was about to abandon, or had abandoned the car, and I then gave instructions to preserve the poultry as far as possible in the event that it was abandoned, and I reported the facts to General Wood, who was the Governor's representative and agent. I think, it just occurs to me, that about this time, I received a postal card from an official of the C. H. & D. railroad, calling my attention to this car of poultry and urged that I give it attention, and a few days afterwards I received a telephonic communication from him along the same lines.

Moved by Mr. Gilbert to strike out all the answer of the witness except that portion which refers to the telephonic communi-
178 action from the C. H. & D. Railway and the card received from the railway company.

Q. 10. Do you remember the name of the officer, or his position, connected with the C. H. & D. railway company from whom you received the card or telephonic communication?

A. My recollection is it was either the Superintendent, or Assistant Superintendent, but I don't recall the name.

Q. 11. Now in connection with those first reports about the feeding of the poultry and the possible abandonment of the car by the caretaker, did you receive any reports about the poultry dying?

Objected to.

A. Yes sir, I received reports of that nature.

Q. 12. What became of that car of poultry, Colonel?

A. I took possession of it.

Q. 13. And was it used for the relief of the flood sufferers, or otherwise?

Objected to.

A. It was so used.

Q. 14. What did you find the condition of the poultry to be upon taking it over, or from reports made you by your men?

Objected to.

A. Part of the poultry, I could not say what percentage, had died and been taken from the car when I ordered my Acting Quartermaster to take charge of it, that is to take charge of it for the purpose of distribution. My impression is that we had been feeding the poultry for a short time before that.

Moved by Mr. Gilbert to strike out answer.

Q. 15. Colonel do you remember giving the caretaker of this car a receipt or certificate showing that you had seized this car to use the contents for the benefit of flood sufferers?

A. I gave him some sort of a certificate showing what had become of the car.

Q. 16. I hand the paper to the reporter and ask that it be marked for identification 'Defendant's Exhibit 2'

(Said paper so marked by the stenographer and attached hereto as Defendant's Exhibit 2.)

and ask you if you will examine it, and endeavor to refresh your recollection and see if that is not, to the best of your memory, a correct copy of the instrument given him at that time.

A. That looks very much like a copy of the certificate that I gave him.

179 Q. 17. Have you any duplicate carbon copy of the original of that Colonel, from which you could verify the dates stated in the certificate?

A. I think that I preserved a copy of that certificate and which is probably filed with the papers in my office relating to that tour of duty.

Q. 18. Is your office here in this building?

A. Yes, in my office here in this building.

Q. 19. Could you verify it?

A. I will look for it—it will only take me a few minutes.

(Witness leaves room to look for papers and returns.)

Q. 20. Now Colonel, have you been to your office and returned, having examined the file you last referred to?

A. Yes sir.

Q. 21. What did you find as to whether or not the paper marked for identification 'Defendant's Exhibit 2' is or is not a correct copy of the certificate you gave the caretaker of the car of poultry showing its taking by the public authorities of the state of Ohio.

Objected to.

A. It is a substantial copy.

Q. 22. I will ask you to state whether the dates named and facts stated in that certificate, as shown by the copy just identified, are correct?

Objected to.

A. I assume they are--the matter was more recent in my recollection then than now.

Cross-examination.

By Mr. Gilbert:

Q. 1. In your examination in chief, you answered that the military took control of the car of poultry on the 3rd of April—what do you say after having examined your office files as to the date of the taking of this car of poultry?

Defendant objects to the question on the ground that Colonel Voll-

rath's answer heretofore and before examining the copy of the certificate was 'about' the 3rd of April.

A. I would say that the certificate that I gave Mr. Chipley, is probably correct as to dates. In my examination in chief I did not intend to be exact as to dates given.

Q. 2. Do you now think after having refreshed your memory it was March 31st?

180 A. It must have been in that neighborhood—at least that is what my certificate says.

Q. 3. Have you any independent recollection outside of the date borne by the paper you have referred to?

A. No, except that based upon a communication which I sent to the President of the Board of Officers at Dayton, Ohio, on the 3rd of May, 1913, relating to this same matter. My recollection as to the exact date upon which this occurred is not very clear outside of the papers mentioned and I would not wish to say under oath as to whether the date of March 31st, was any more correct than the date of April 3rd, because I cannot tell at this late date. I find the two dates in these papers.

Q. 4. In whose handwriting are the original papers you have referred to and found in your office?

A. In my own handwriting.

Q. 5. What was the date of the taking according to your own handwriting?

A. That date is marked March 31st, 1913.

Q. 6. You speak of having received from the C. H. & D. railway Company a car with reference to this poultry—have you the card?

A. I didn't find it—I looked for it.

Q. 7. Do you think you have the card?

A. I can't find it—I don't know where it is if I have it.

Q. 8. What is your best judgment as to whether or not you preserved it?

A. My clerk and myself searched for it among my office files relating to this matter and we have failed to find it.

Q. 9. I wish you would state who this car was from?

A. I don't remember the name of the gentlemen—he was an officer, as I remember it, of the C. H. & D. Railroad.

Q. 10. What was the purport of the communication?

A. This car of chickens needed attention and urged me to take care of it or take possession of it—I don't remember which.

Q. 11. You also stated you had a telephonic communication?

A. Yes sir, calling my attention to the fact that his request had not been complied with.

Q. 12. Who was that from?

A. The same gentleman.

Q 13. Remember the name?

A. I don't remember the name.

181 Q. 14. Was it Mr. Fleming?

A. I don't think.

Q. 15. Was it Mr. Corcoran?

A. That sounds more familiar—what was his position?

Q. 16. Mr. Corcoran was division superintendent at the time.

A. It was either the superintendent or assistant superintendent—it might have been division superintendent, but I would not say positively.

Q. 17. And the telephonic communication had again requested you to take charge of the poultry?

A. Yes sir.

Q. 18. How long before you took charge?

A. Just a day or so—I took up the matter with General Wood. The fact is, I had taken the matter up with relief headquarters of the N. C. R. from which place the supplies were furnished, calling their attention to this car—then I took it up with General Wood about the same time.

Q. 19. Did you report to General Wood the information you had received from the C. H. & D. people?

A. My impression is that I did.

Q. 20. And you reported to him the requests that had been made of you?

A. I think I reported the conversation with this gentleman and the communication received from him.

Redirect examination.

By Mr. Dick:

Q. 1. Colonel, did I understand from your answer to Mr. Gilbert that this car of poultry was confiscated at the request of the railroad people, or by the direction of the military authorities?

Mr. Gilbert: I object—the witness has told what occurred.

A. I will tell you how I finally took possession of the car—General Wood told me to take charge of it.

(Signed) EDWARD VOLLRATH.

182 *Notary's Certificate.*

Certificate to Depositions.

THE STATE OF OHIO,
*Crawford County, ss:*

I, W. L. Monnett, of the County of Crawford and State of Ohio, a Notary Public within and for said County, duly appointed to take the depositions of Carl A. Brown and Edward Vollrath, of the City of Bucyrus, County of Crawford and State of Ohio, hereby certify that previous to the commencement of the examination of said witnesses, in the suit brought by Collins Produce Company vs. Chicago & Eastern Illinois Railroad Company pending in the District Court of the United States, for the Eastern District of Illinois, said witnesses were duly sworn to testify to the truth in relation to said matter in controversy, and signature to said depositions was waived in my presence

by G. Gale Gilbert, attorney for plaintiff, and Homer T. Dick, attorney for defendant, on said 28th day of April, 1914, in said City of Bucyrus and State of Ohio.

In witness whereof I have hereunto affixed my hand and Notarial Seal this 4th day of May, 1914.

[SEAL.]

W. L. MONETT
*Notary Public, Crawford Co., O.*

DEFENDANT'S EXHIBIT NUMBER 2.

H'dq'rs Zone 1.

Dayton, Ohio.

Military District.

4-5-13.

This is to certify that on Monday, March 31st, upon telephonic orders from Adjutant General Geo. A. Wood, and being the orders of the Governor of Ohio, I seized and confiscated a car of poultry on the C. H. & D. tracks in North Dayton, then in charge of Thos. Shipley, and being car L. P. T. 739 (Car no. reported by Mr. Shipley). This seizure was made to relieve the flood suffering in my Zone and the contents of the car were distributed accordingly. Car was said to have been shipped by Collins Produce Co. of Mt.
183 Vernon, Ill. to C. E. Barker & Co., Newark, N. J. Per cent of dead fowls in car at time of seizure not known.

(Signed) EDWARD VOLLRATH,
*Col. Eighth Ohio Inf't'y, Commander*
*Zone 1, Dayton Military District.*

*Testimony of J. J. Corcoran.*

JOHN J. CORCORAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dick:

Q. What is your name?
A. John J. Corcoran.
Q. Where do you live?
A. Detroit.
Q. Michigan?
A. Yes.
Q. Where did you live March 1913?
A. Dayton, Ohio.
Q. What was your business there?
A. Superintendent of the Toledo division of the C. H. & D.

Q. Is that the Cincinnati, Hamilton and Dayton Railroad?
A. Yes.
Q. Where was your office—in the city or elsewhere?
A. City of Dayton.
Q. Do you remember the occasion of the high water there in March 1913?
A. Yes.
Q. Where were you the day that the high water came on?
A. In the office.
Q. In the city of Dayton?
A. Yes.
Q. How long did you remain there?
A. Remained there until Thursday about 12:30.
Q. Do you remember the day of the week that it came on?
A. On Tuesday.
Q. Was there any reason to keep you from going out of the office at that time?
A. It was impossible to get out.
Q. Tell us why that was.
184 A. The water came up about 8:35 or 8:40—I was out on the street, on the railroad crossing, about three hundred feet from the office—I saw it coming down Webster Street and I ran to the office—I saw the force coming down—I knew if they got out on the street they would get caught with it and I ran down and told them all to go back.

Mr. Gilbert: I object to what he told them.

Q. Just tell what you did.
A. I went to the office as quick as I could and the water filled in on the lower floor—I ran upstairs where our office was—the lower part of the freight house.
Q. Tell us what effect that water had on the operation of your railroad?
A. In fact, it had stopped the operation the night before, I judge about ten o'clock, the last train we had into Dayton—the last train we got through Dayton north was 2:25 in the afternoon, Monday—the next train, the midnight train, detoured by the Pennsylvania on account of the line north of Dayton being washed away.
Q. What part of that line did you have charge of as superintendent
A. Toledo to Cincinnati.
Q. Now when the water went down, did you go down and make an examination of the railroad to see the effect of it?
A. Not right away.
Q. What did you do first after that?
A. Thursday, about 12:45, we got a boat and got out—we had about six feet of water on the street where our office was—I devoted the rest of that afternoon and the night and the next morning to hunting my family—I located them along about three o'clock Friday afternoon.

Mr. Gilbert: I object to all this—it is immaterial.

The Court: I don't think this is necessary—if he operated his road he may say so—if he didn't, he may state that and why—I think he has already stated that.

Q. What did you do after that?

A. The next day was Saturday—I spent that doing the same thing.

Q. Do you remember how soon the water got down so you could make an examination of the railroad in that vicinity?

A. I made a trip—that is, I walked to North Dayton on Sunday—from the office to the North Dayton coal dock and the N. W. track.

185 Q. What did you find, if anything, in the way of any obstructions at that time?

A. Both tracks were covered with debris and washed out from below—it was absolutely impossible to operate over them.

Q. How long did that condition continue in that vicinity?

A. We got one track so we could get constructions train over it about the middle of the following week.

Q. Mr. Corcoran, do you know of a car of poultry being out at north Dayton at the time of that flood in an L. P. T. car, 739?

A. Yes.

Q. Did you see the caretaker in charge of that car of poultry at any time out there?

A. Yes.

Q. About what day was it that you saw him if you remember?

A. As I recollect, he came to my office on Sunday.

Q. The first Sunday following the highwater?

A. Yes.

Q. If he made any complaint to you or said anything to you, tell us what it was.

A. His object in coming there was to tell me that the poultry was out there without feed.

Mr. Gilbert: I object to the witness assuming what his object was.

Q. Tell us what he said to you, if anything.

A. He said the car of poultry was there and had no feed for it and it was up to the railroad Company to secure feed for it.

Q. Where was it he said this to you?

A. In my office.

Q. How far was that from where the car of poultry was located?

A. Three quarters of a mile.

Q. If you did anything following that information from this caretaker, tell us what it was.

A. I made an effort to secure feed, and we couldn't get any.

Q. Tell us if you went out, or whatever you did—tell us what you did yourself.

A. I went up to the point where the car was and talked to the gentleman myself—he mentioned something about getting some feed from a farmer or a house close by—he had gotten all they

186 could spare—he also mentioned the fact that a man had made a proposition to him to unload the poultry and put them in an enclosure he had there—I didn't pay very much attention to that but I told him it was absolutely impossible for me to secure any feed for him, and my advice, rather than let the poultry die, would be to turn them over to the authorities, together with his invoice—he said that he would not—he wanted these chickens to go to destination—I then told him it was impossible for me to tell him when the line would be open.

Q. Now, Mr. Corcoran, who if anyone, was in charge of or control of the situation there at Dayton—what forces, if any, civil or military?

A. We recognized none except the military—while we did deal with what was known as the City Citizens' Committee, but they couldn't, of course, command us to do anything.

Q. Who had possession of the railroad tracks and property of the Cincinnati, Hamilton and Dayton Railroad Company through Dayton at the time the waters receded—the Railroad Company or the military authorities?

Mr. Gilbert: I object to that.

The Court: If he knows who had control of the property, he may state that.

A. The military authorities.

Q. Tell us how you know that.

A. I had to have a military pass to go up the tracks to try to direct the movement of cars—got permission from them to do so.

Q. If they took possession of any property that was in possession of the Cincinnati, Hamilton and Dayton Railroad at the time this high water came, you may tell how *the* proceeded to do that.

Mr. Gilbert: I object to that, except as to this poultry.

The Court: He may tell if they took possession of his property.

A. We had two sections of a merchandise train that only got that far—they contained all manner of merchandise, eatables and wearing apparel and so forth—they took charge of both trains and carded the cars.

Q. Who do you mean by 'they'?

A. I mean the military authorities—we recognized General Wood.

Q. Was he the officer in command?

A. Yes.

187 Q. You spoke of their carding the cars.

A. They applied a card to all the cars—that was an indication or notice that these cars could not be moved or their contents disturbed without their sanction or their permission.

Q. Now Mr. Corcoran, do you know who, if anyone, took this car of poultry or what became of it after the water receded?

A. Yes sir, I saw the car being unloaded at Leo Street under the direction of the soldiers.

Q. Were they in uniform?

A. Yes.
Q. Were they armed?
A. Yes.
Q. Did you at any time before the military took possession of that car and so unloaded it, request them to do so?
A. No sir.
Q. Did you have any communication with the military authorities in charge there at Dayton with reference to their taking over that car of poultry?
A. No sir—I might state this, that on my trip out there it was necessary for me to explain to the guards my mission there—I told them I was going out to look after the car of poultry that the man in charge was demanding feed for.
Q. Wasn't the car then being guarded by the soldiers?
A. Yes sir—not exactly at that car, but they were distributed back and forth very closely together, clear from North Dayton down into the city.
Q. Can you tell us some other property that had been in possession of the Cincinnati, Hamilton and Dayton Railroad before this high water that was also taken by the military authorities?

Mr. Gilbert: I object to that.
The Court: I think he said the military authorities had charge there—what is the use of repeating it?

Q. I will ask you to state if, before this car was taken over by the military authorities there to unload, if you wrote a postal card or any other communication with reference to their taking possession of this car?
A. No sir—couldn't get any postal card.
Q. With reference to any telephone communication with the military with reference to the taking of this car, prior to its confiscation, can you tell us anything about that?
A. We had no telephone connection, not until the latter part of the first week in April.
188 Q. Was there any means of telephoning from your office at that time prior to the first week in April?
A. No sir—we had to put in service an automobile for messenger work.

Cross-examination.

By Mr. Gilbert:

Q. Where was your office?
A. Third and Webster—on Webster Street, just off of Third.
Q. Is that downtown?
A. It is about one half mile north of the Union Depot.
Q. Did you have a freight office at that time?
A. The freight office was on the lower floor—the local office.
Q. The freight office was on the lower floor?
A. Yes.
Q. Who was in charge of that?

A. You mean through the flood?
Q. Yes.
A. O. B. Groves was the local agent.
Q. Who?
A. O. B. Groves.
Q. Was there any other office that had anything to do with freight other than the office you speak of?
A. You mean at that point?
Q. No, in Dayton.
A. The freight solicitor had an uptown office.
Q. Is that all?
A. And the general passenger office.
Q. How many employes were connected with the freight office of this railroad company?
A. At Third and Webster Streets?
Q. Yes.
A. Mr. Groves had probably twenty five clerks.

*Testimony of O. B. Groves.*

O. B. GROVES, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dick:

Q. State your name?
A. O. B. Groves.
Q. Where do you live?
A. Detroit.
189 Q. What is your business?
A. Local freight agent of the Pere Marquette Railroad.
Q. What were you doing in the latter part of March, 1913?
A. Local freight agent for the Cincinnati, Hamilton and Dayton at Dayton, Ohio.
Q. Did you live there at that time?
A. Yes.
Q. Do you remember the day the high water came up into Dayton, known as the Dayton flood?
A. March 25th in the morning.
Q. Where were you at the time of the high water?
A. I was home, 1509 North Main Street.
Q. When did you first get to your office after the high water came?
A. Either on Friday the 28th or Saturday the 29th—I would not say for sure—I think it was Friday the 28th.
Q. From that time on were you at your office in office hours?
A. I had no office—I had only a room upstairs.
Q. What became of your office?
A. It was wrecked—everything was wrecked.
Q. What was there by way of telephone communication?
A. There was no telephone communication—our cable came in

from the Second Street house and that house was completely destroyed. Of course the cable went down with that—we had no telephone service at all.

Q. Do you know Shipley, the man who was the caretaker of the car of poultry here in North Dayton at the time of this flood?

A. I did not.

Q. Did you ever have any conversation with him?

A. No sir.

Q. In person or by telephone?

A. No sir.

Q. Were you at North Dayton at any time within the first week after this high water came on, this flood?

A. No sir.

Q. I will ask you if — ever called upon the military authorities at Dayton to take possession of this car of poultry belonging to the Collins Produce Company and take it out of the possession of the Cincinnati, Hamilton and Dayton Railroad Company?

A. No sir, I don't remember of ever having any communication whatever in reference to that car of poultry.

190 Q. Did you ever write to the military authorities or speak to them about that subject?

A. I didn't write to them about it—I had no stationery or anything to write on—everything was destroyed.

Q. If you remember, when was telephone connection again restored in your office?

A. It was not restored in my office proper until after the first of May—along about the first of May.

Q. When did you first have means, after this high water or flood, of telephoning?

A. We had some temporary phones upstairs—I think it was along about the latter part of the first week in April, after the flood—I think that is when it was.

Q. Are you acquainted with a man who lives out at North Dayton, or were you at that time, who lived near the Cincinnati, Hamilton and Dayton Railroad, named William Nies?

A. No sir.

Q. Were you out there the first week after this great flood came on and *and* had conversation with him at the car about the taking of this car of poultry?

A. No sir.

Q. Were you out there at all during that time?

A. No sir, it was along about the middle of April before I got out to North Dayton at all.

Cross-examination.

By Mr. Gilbert:

Q. How many employes were connected with the freight department at Dayton at that time?

A. I had on my payroll about thirty two clerks and about thirty five to forty laborers.

Q. Do you wish to state that telephone communication in Dayton was completely destroyed all around?

Mr. Dick: I object to that—it is not cross-examination—the witness only stated as to telephone communication from his office.
The Court: It is not cross-examination.

Q. I will ask you whether or not it was destroyed?
A. Destroyed in the city of Dayton?
Q. Yes.
A. I can't answer that.
Q. Don't you know it was not?

Mr. Dick: I object to that.
The Court: I sustained an objection to that a while ago.

191 Q. You don't recall any communication with Shipley?
A. No.
Q. Don't know Shipley?
A. No.
Q. Don't recall a conversation in the presence of Nies in reference to this produce?
A. No sir.
Q. Part of the time you were not in the freight house?
A. Part of the time, from the 25th to 28th or 29th.
Q. I will ask you if you remember whether telephonic communication was in daily use with the headquarters of General Wood down at the hotel?
A. You mean from our place?
Q. From different points in the city?

Mr. Dick: I object to that.
The Court: Sustained.

By Mr. Dick:

Q. Mr. Gilbert asked you about your not being in the office on the 26th and 27th of the month—will you tell us what, if anything, kept you from being in the office?
A. I couldn't get down on account of the flood.

Defendant introduces in evidence the following depositions. The caption, reading of which is waived, is as follows:

*Stipulation.*

In the District Court of the United States, Eastern District of Illinois, March Term, A. D. 1914.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

It is hereby agreed and stipulated by and between the plaintiff, Collins Produce Company, and the defendant, Chicago and Eastern Illinois Railroad Company, that the depositions of George H. Wood, E. O. Clark and of other witnesses on behalf of the plaintiff shall be taken before Joseph C. Nailor *at* Notary Public, at his offices at 411-420 New First National Bank Building in the City of Columbus, County of Franklin and State of Ohio, commencing at nine o'clock
A. M. Tuesday, April 28th, 1914; at which time and place it
192 is also agreed that the defendant may also take the depositions of witnesses in said cause in its behalf on oral interrogatories.

It being understood and agreed by the parties to this suit that all notices and all legal formalities as regards the taking of such depositions are hereby waived.

Dated this the 7th day of April, A. D. 1914.

G. GALE GILBERT,
*Attorney for Plaintiff.*
HOMER T. DICK,
*Attorney for Defendant.*

*Bill of Exceptions.*

In the District Court of the United States, Eastern District of Illinois.

No. 915.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

*Depositions of George H. Wood and E. O. Clark, witnesses on behalf of the plaintiff, and Isaac D. Pugh and Samuel E. Neff, witnesses on behalf of the defendant, taken on the 28th day of April, 1914, at the office of J. C. Nailor, 411-420 New First National Bank Building, Columbus, Ohio, before Joseph C. Nailor, a Notary Public of the County of Franklin and State of Ohio, in the above entitled cause pending in the District Court of the United States Eastern District of Illinois, pursuant to the annexed agreement and stipulation, and at the time and place herein mentioned, to be read as evidence on behalf of the respective parties as above indicated, on the trial of the aforesaid cause.*

Present:

Mr. G. Gale Gilbert, On behalf of the plaintiff;
Mr. Homer T. Dick, On behalf of the defendant.

It Is Further Stipulated and Agreed By All of the parties hereto that these depositions shall be taken in shorthand by L. C.
193 Dillon, an Assistant Official Stenographer of the Common Pleas Court of Franklin County Ohio, the signatures of the said witnesses to both the shorthand notes and transcript of the same being hereby expressly waived; each of said depositions to have the same force and effect as if signed by the said witnesses respectively as provided by statute.

Mr. Whitnell reads as follows:

*Deposition of G. H. Wood.*

GEORGE H. WOOD, a witness called on behalf of the plaintiff, of lawful age, being by me first duly cautioned and sworn as hereinafter certified, deposes and says as follows:

Direct examination.

By Mr. Gilbert:

Q. 1. Please state your name, age and residence.
A. George H. Wood; present residence, 47 Miami Avenue, Columbus Ohio; age, forty six.
Q. 2. What is your present position or business?
A. Adjutant General, State of Ohio.
Q. 3. How long have you occupied that position?
A. January 13, 1913.
Q. 4. Where did you formerly reside?
A. Dayton, Ohio.
Q. 5. General Wood, where were you during the last five or ten days of March, 1913?
A. Dayton, Ohio.
Q. 6. During that time I will ask you if you received any information with reference to a car of poultry?
A. I think I had better state my position in Dayton, Ohio, at that time.
Q. 7. We will get to that later.
A. Well, of course, this question I will answer all right, but it would look foolish for me to answer it until you bring in the fact what I was doing in Dayton and what I was there for.
Q. 8. Well, I will eliminate that question and ask you what your business in Dayton, Ohio, was at that time?
A. I was military commander of the Dayton Military District, covering Montgomery County, Ohio, under the orders of Governor James M. Cox—said district having been placed under martial law by proclamation of the Governor.

Q. 9. I will ask you if during that time you received any
194 information with reference to a car of live poultry in the possession of the C. H. & D. Railroad Company?

A. Yes sir.

Q. 10. From whom or through whom did you receive this information?

A. At that time my headquarters were at the Hotel Algonquin, corner Third and Ludlow Streets. The city of Dayton was divided into five military zones. Colonel Edward Vollrath, commanding officer 8th Infantry O. N. G. was commander of the first military zone, covering North Dayton—and the first information I had in regard to a carload of chickens was received over the telephone from Colonel Vollrath and communicated to me by some officer on duty in my office.

Q. 11. When was the second information, if you received any later information?

A. My recollection is that there were several communications from Colonel Vollrath in regard to this carload of chickens. Later the C. H. & D. telephoned my office in regard to the same. I did not personally receive any telephone messages but they were reported to me by the officers who personally did the talking.

Q. 12. What report did you receive from your subordinates with reference to the telephone communications to you by the agents of the C. H. & D. Railroad Company?

Mr. Dick: Defendant objects to the question as calling for hearsay testimony.

A. It was reported to me that the C. H. & D. through some person in their freight department stated that they were unable to move this car of poultry—that the car had been abandoned by the parties in charge of it; that the poultry was dying, and that no food could be obtained for the same; and they advised that it be used for the hospitals and sick of whom there were quite a number in the City of Dayton at that time.

Q. 13. Did you act under that advice, General Wood?

A. After getting in communication with Colonel Vollrath over the telephone, and receiving from him corroboration of the statements made by the Railroad Company, I directed him under the circumstances of the case to take possession of the car of poultry and use the same for the benefit of the hospitals and the sick.

Q. 14. Did you take any steps toward the taking into cus
195 tody and disposition of this car of poultry until after the request or advice of the agents of the Railroad Company?

A. I did not direct Colonel Vollrath to take possession of the car of poultry until after I received the communication from the Railroad Company.

Q. —. How many communications came to you from the office of the railroad Company with reference to your taking and disposing of this car of poultry?

A. After the lapse of a year's time, as at the time in question I

was very busy running the affairs of the City, I would not care to state positively; but I should say that it was reported to me at least twice. It is hard to recollect the exact number of times, but I think at was at least twice it was reported to me by my subordinates in the office. I had no telephone communication myself.

Q. 16. From what department of the C. H. & D. Railroad was this information received?

A. I was told that it was received from the freight department—local freight department.

Q. 17. In Dayton?

A. Yes sir.

Q. 18. As to the actual condition of this poultry, you know nothing of your own personal knowledge?

A. Absolutely nothing. My information, as far as the military proposition was concerned, was derived from the report made to me over the telephone.

Q. 19. And also from the request by the Railroad Company?

A. Well to a certain extent yes—but the absolute facts to the condition, I relied upon Colonel Vollrath's statement.

Q. 20. Personally you know nothing as to the amount of feed on hand—you know nothing personally of whether Mr. Shipley, who was in charge had abandoned the car?

A. I acted upon the advice received from Colonel Vollrath, an officer of long standing in the Ohio National Guards. I never saw the car myself—had no opportunity to see same.

Cross-examination.

By Mr. Dick:

Q. 21. General, what is the military organization of the State of Ohio?

A. It consists at present of practically eight regiments of infantry, four troops of cavalry, four batteries of artillery, two signal
196 corps, battalion of engineers, and field hospitals and ambulance corps.

Q. 22. And was that true in March, 1913?

A. Yes sir.

Q. 23. And who in the state of Ohio is the commander in chief of that force?

A. The Governor, sir.

Q. 24. Is that known as the Ohio National Guard?

A. Yes sir.

Q. 25. And to whom did you report at the time the Governor proclaimed martial law at Dayton?

Question objected to by plaintiff.

Q. 26. Who was your chief if any?

A. The Governor of Ohio, sir.

Q. 27. What force of members of the Ohio National Guard did you have on duty at Dayton during the flood of March, 1913?

A. From three thousand, down to a hundred and fifty at the end.
Q. 28. Were there three thousand there just after the height of the flood—the latter part of March, 1913?

Question objected to by the plaintiff.

A. Yes sir.
Q. 29. About what was the size of the City of Dayton at that time—about how many inhabitants?
A. About 117,000 sir.
Q. 30. And in what County is Dayton, Ohio situated?
A. Montgomery County.
Q. 31. And did I understand you correctly to reply to Mr. Gilbert that the Governor, by proclamation, when this great flood came on, created Dayton and Montgomery County into a military district?
A. Yes sir.
Q. 32. And proclaimed martial law?

Question objected to by the plaintiff.

A. Yes sir.
Q. 33. Were these soldiers in Dayton in uniform, and armed?

Question objected to by the plaintiff.

A. Yes sir.
Q. 34. You spoke of your headquarters being at the Algonquin Hotel.
A. Yes sir.
Q. 35. At any time during this flood was the water in that part of the city?
197 A. About eleven feet.
Q. 36. Eleven feet of water. And your communication was by telephone or how?
A. Largely by telephone—all street cars and ordinary means of transportation were cut out, and the streets were badly blocked and it was difficult to get to different parts of the city—and therefore the telephone was largely used.
Q. 37. Now you in reply to Mr. Gilbert testified to reports made to you of some person purporting to be at the C. H. & D. freight office, telephoning to your subordinate officers about this carload of poultry, and that the person in charge was short of feed for it, and that the poultry were dying. Did you get any report from Colonel Vollrath, stating the conditions that he found at that car?
A. Yes sir.
Q. 38. Did he report to you that the car had been abandoned by the caretaker?

Question objected to by the plaintiff.

A. Yes sir.
Q. 39. And did he report to you that the fowls were dying?
A. Yes sir.

Q. 40. And did he also report to you that they were short of feed for the fowls?

A. Yes sir.

Q. 41. Now General in connection with this matter of food supplies, what did you do during the height of the flood in the way of taking possession of any food supplies found within your military district, and administering them for the benefit of the flood sufferers?

Question objected to by the plaintiff.

A. Quite a good deal of food was confiscated by orders, and used for the benefit of flood sufferers.

Q. 42. And were such food supplies thus confiscated and taken possession of whether in the custody of grocers or other dealers or in the possession of railroad carriers?

Question objected to by the plaintiff.

A. There were confiscations along those lines, yes sir.

Q. 43. Do you remember General, whether at that time you also confiscated and used for the benefit of the flood sufferers some carloads of live stock and hogs?

A. Hogs, yes sir.

Q. 44. Now General, in determining your action with reference to the taking of this carload of poultry, is it not a fact that
198 you were governed in ordering this confiscation, not by anything that was said with reference to it, or purporting to be said, by railroad employes, but by the necessities of the situation the same as any other stores of food stuffs or articles that would be used for the relief of the flood sufferers?

Question objected to by plaintiff.

A. If it had not been for the report made by Colonel Vollrath, which was substantially confirmed by the statements of the railroad Company, I would not have taken or ordered taken the carload of poultry, for the reason that knowing in ordinary cases of confiscation the bill would have to be settled by some one, I would not have fed flood sufferers poultry.

Motion by plaintiff to strike out answer.

A. In other words, this was not an ordinary case of confiscation.

Q. 45. And as I understand you, you were influenced principally and your course finally determined by the reports made to you by your Colonel commanding the zone in which the car was situated at the time—that is, Colonel Vollrath?

Question objected to by plaintiff.

A. The practical agreement of the statements made by Colonel Vollrath and whoever telephoned from the C. H. & D. office governed my conduct.

Q. 46. General, before you moved to Columbus, how long had you lived in Dayton?

A. About forty-five years and two months.
Q. 47. Practically all of your life?
A. I was born there.
Q. 48. In your experience of living in the city of Dayton, did you ever know of a flood of the magnitude of the flood of March, 1913, before that time?

Question objected to by the plaintiff.

A. No sir.
Q. 49. You stated that ordinary street car and other transportation about the city was suspended.
A. Yes sir.
Q. 50. What would you say as to transportation through Dayton on the lines of steam railroads, such as the Big Four line between Columbus and Cincinnati, passing through Dayton, and the Cincinnati, Hamilton and Dayton's line that runs from Cincinnati through Dayton to Toledo, and the Pennsylvania line that
199 runs down from Columbus through Xenia and Dayton and west toward Richmond and Indianapolis?

Question objected to by plaintiff.

A. The first two weeks after the flood all communication west and south through Dayton was cut off by the fact that the west span of the Union railroad bridge over the Miami River was gone. As far as railroad facilities to the east and north were concerned, I can't say personally—but my understanding was that they were very badly crippled, and the reports that I had were reliable reports, though I don't know personally.
Q. 51. Was there any great damage to property within the flooded zone General?

Question objected to by plaintiff.

A. Well, it was estimated somewhere near a hundred million, I believe.
Q. 52. And I will ask you General, if these railroads that I have referred to, the lines of the C. H. & D., the Big Four and the Pennsylvania, in passing through Dayton, Ohio, passed through some of the flooded district?
A. Yes sir.
Q. 53. And I will ask you if the main lines of those railroads were inundated to a considerable depth and damaged during that flood?
A. I know they were inundated—as to their damage I cannot state but I know they were inundated.
Q. 54. About how deep was the water, General, where those railroads passed through the part of Dayton near where they cross the Miami River on this Union bridge that you referred to?
A. Eleven to thirteen feet.

Redirect examination.

By Mr. Gilbert:

Q. 55. General, transportation from Dayton north and east was resumed before it was to the south, was it not?

A. Through transportation of course, was crippled till the bridge was repaired, but the Pennsylvania, I know, ran trains very shortly after the flood from the western limit of Dayton, but did not get into the central part of the city.

Q. 56. You answered Mr. Dick, General, that you would not have touched this car of poultry had it not been for information received by you through your subordinates from Colonel Vollrath
200 and the agents of the railroad company—and that is true?

A. The corroboration of the testimony from the two parties finally settled my action.

Q. 57. And the expression that came to you from the agents of the Company that this property should be disposed of through your office was taken into consideration and contributed to your action?

A. Yes sir.

Q. 58. You understood from the information received from the railroad office that it was entirely agreeable with them for you to dispose of this car of poultry?

Mr. Dick: Defendant objects to this question, both as leading and asking a conclusion of the witness and being otherwise irrelevant and immaterial.

A. "Entirely agreeable" is probably putting it too strong.

Q. 59. Well, leave out the word "entirely"—and answer the question with that word eliminated.

A. The railroad company, as reported to me, stated certain facts and certain conditions.

Q. 60. Why would they report it to you?

A. I had command of the Dayton military district.

Q. 61. They knew that?

A. Yes sir. And acting upon those facts and conditions, as corroborating the report made by Colonel Vollrath, I directed Colonel Vollrath to take possession of the poultry. I want to be fair in this to everybody, and therefore I say that the word- "entirely agreeable" would be putting it a little bit too strong.

Q. 62. Well, General, under the conditions that existed there, from the information received from the office of the railroad company, did you understand that it was agreeable and not objectionable to them that you make a disposition of this poultry?

Same objection by defendant.

Q. 63. In other words, that you had their consent?

A. The word 'consent' is not a very good word to use in this connection, under martial law. The authority of an officer in command acting under martial law is supreme—and to use the word 'consent' would be rather in contradistinction to martial law.

Q. 64. General, I will ask you to examine the letter that I hand you carefully.

A. Yes, that is my signature.

201 Q. 65. Did you write that letter, General?

A. Yes, I did—it is my signature.

Q. 66. In the letter you used this expression—'the poultry was beginning to die at the time—the railroad company requested us to take possession of the car in order to save the poultry that was left.'

A. Well, sir, that is practically correct.

Q. 67. That is correct—that statement is what you wish to make as your answer to the question I have just asked you?

A. That letter is practically correct, yes sir—I will stand by my handwriting.

Q. 68. You stand by that letter?

A. Yes sir.

Mr. Gilbert: We ask that the reporter mark this for identification as Exhibit 1.

And thereupon the paper writing last above identified was marked for the purpose of identification as Exhibit No. 1.

Q. 69. It is true, then, General, that it was after repeated requests from the office of the railroad company that you took charge of this car of poultry?

A. As I said, Mr. Gilbert a few minutes ago in my testimony, that testifying under oath and having had no conversation with the railroad company myself, I have simply got to remember what happened at the time—and whether there were more than one request, or whether the matter was brought to my attention in my office more than once, I cannot say; because I had no telephone communications myself with the railroad company.

Q. 70. Your memory of course, upon that point, would have been as good on the 21st of last August or better, than it would be at this time, being nearer the time of the occurrence?

Mr. Dick: Defendant objects to that question as leading and not proper redirect examination.

Q. 71. What is the answer, General?

A. I haven't answered. I would answer that question in the negative, because the letter in question was written as a part of my daily mail, which is often quite large and when the matters involved were not in the serious condition they are now. Since this subpœna has been served on me I have gone over the facts very carefully in my mind, trying to bring as vividly before me as

202 possible the situation of the case; and therefore, while the letter I acknowledge is my letter, still I would not give it any more credence than the testimony I am now giving under oath, because then it was simply part of my daily mail, which at that time, in August was running very large.

Q. 72. You however stated that you still stand by your letter?

A. Oh, that letter was written as my letter and——

Q. 73. Is substantially correct?
A. Subject to what I have said in answer to former questions.

Recross-examination.

By Mr. Dick:

Q. 74. General, were there other reports made to you about various conditions over the city at the time, besides the telephone communications from the freight house and from Colonel Vollrath?
A. At a minimum, Five hundred to a thousand a day. The city Government was completely gone and all the departments of the Government were centered in my hands.
Q. 75. And I will ask you General, if it is not a fact that a great many other questions relative to the use of stores of food and supplies and the like were not coming before you constantly about that time?
A. All most minutely, more than hourly.
Q. 76. And in deciding on such matters is it not a fact that you considered the best interest of all concerned rather than the consent of any particular individual?

Question objected to by plaintiff.

A. Yes sir.
Q. 77. General, Mr. Gilbert has asked you something about the Pennsylvania Railroad commencing to operate soon after the flood from the west bank of the Miami River. Isn't it a fact that after the Pennsylvania commenced to operate from over at that side of the river that there could be no transportation of cars between north Dayton and the part of the Pennsylvania railroad that was so operated, on account of the intervening conditions and the damage to the Miami river bridge?
A. Yes sir.

203 Redirect examination.

By Mr. Gilbert:

Q. 78. General, I want to get this perfectly clear in the record, and I will ask you whether or not the statement contained in your letter of August 21, 1913, that it was not until this request, referring to the railroad company's request, 'at the time the railroad requested us to take possession of the car that I took action.'
A. It is correct that I didn't take any action until after I had received the communication from the railroad company, yes sir.
Q. 79. And it is true that you were requested by the railroad company to take action with reference to the disposition of this car of poultry, as stated in your letter?

Mr. Dick: The defendant objects to this question as being leading, and improper direct examination, and seeking by improper means to get into evidence an incompetent document.

A. Nothing was done by me in reference to this car of chickens

until after I had received the information from the railroad company that the car could not be moved—that the poultry was dying——

Q. 80. Excuse me for interrupting you, but I think my question is entitled to be answer- by yes or no.

Mr. Dick: Defendant objects to this style of interrogation and insists that the witness has the right to answer the question in his own way.

Q. 81. Well I will ask you again General, were you requested by the railroad Company, as stated in your letter of August 21, 1913, to dispose of this poultry, as you were informed by your subordinates?

Mr. Dick: Defendant objects to this question as calling for heresay evidence.

(Question 81 read.)

Mr. Dick: Defendant further objects to this question as being self contradictory and non-intelligible.

Q. 82. I will just reverse the question—through your subordinates did you receive information to take and dispose of this car of poultry, at the request of the agents of the C. H. & D. railroad company?

Mr. Dick: Defendant renews all the objections made to the former question.

Q. 83. I think you understand that question?

A. I understand the question—there is no question about
204 that—what I want to do is to answer the question fully and truthfully, to the best of my knowledge and ability. That is what I want to do.

Mr. Dick: Defendant also objects to this question on the ground that it is mere repetition, having been fully gone into in chief.

(Question 82 read.)

A. The agent of the C. H. & D. Railroad Company, according to reports received by my subordinates and transferred to me, made the reports in regard to the condition of the car referred to in my previous testimony, and advised that some action should be taken in regard to the car. I make this answer after a careful consideration of the entire matter and reference to my letter of August 21, 1913. Considering that the word "request" used in that letter might possibly be too strong a word, I would now, testifying under oath, in the letter use the word "advise" instead of "request."

By Mr. Dick:

Q. 84. General, just one question—it was not reported to you at any time during these telephone conversations who it was at the C. H. & D. freight house that was doing this talking, was it?

A. I was told it was the agent.

*Deposition of E. O. Clark.*

E. O. CLARK, a witness on behalf of the plaintiff, of lawful age, being by me first duly cautioned and sworn as hereinafter certified, deposes and says as follows:

Direct examination.

By Mr. Gilbert:

Q. 1. You may state your name, age and residence.

A. E. O. Clark. My residence at the present time, 197 East State Street, Columbus, Ohio.

Q. 2. Where did you formerly reside?

A. My home is in Dayton, sir—1599 West Fifth Street.

Q. 3. What is your profession or business?

A. I am chief clerk to the Adjutant General.

Q. 4. State of Ohio?

A. State of Ohio, yes sir.

Q. 5. Were you chief clerk to Adjutant General Wood during the high water in Dayton, Ohio, in March, 1913?

A. I was in the Adjutant General's office, but at that time
205 I was assistant Adjutant General in the Dayton military district.

Q. 6. Under General Wood?

A. Under General Wood, yes sir.

Q. 7. To whom did you report information received with reference to matters coming under your observation?

A. To the General, sir.

Q. 8. Referring and calling your attention particularly to a car of poultry that was on the tracks of the C. H. & D. Railroad Company in North Dayton, I want to ask you to state what information, if any, or what request, if any, you received from the agents or agent of the C. H. & D. Railroad Company at Dayton with reference to this car of poultry?

A. As Assistant Adjutant General I had charge of the routine work at headquarters, and one afternoon I was called by some one who said he was the freight agent of the C. H. & D. He stated that there was a carload of chickens, poultry, located on the tracks in North Dayton—that it had been reported that the poultry was dying—that they were unable to move the car out of the city, and it would seem best to dispose of the contents of the car.

Q. 9. Did the agent or representative of the Railroad Company who called headquarters ask you to do anything with reference to this poultry?

A. Now, to the best of my knowledge, he said he thought it was best that we take the stock of chickens and distribute them among the hospitals, as they were dying, and they could not move them.

Q. 10. I will ask you to examine a letter dated August 21, 1913, carefully, and state if that is your letter?

A. It is, sir.

Q. 11. I will ask you to read that letter and state if your recollection is refreshed upon the point of what you were asked to do by the representative of the Railroad Company, and then state what, if anything, the representative of the Railroad Company asked you to do?

A. First, I would rather have had you ask me how this matter was first brought to my attention.

Q. 12. We will probably get to that later.

A. This agent, as I stated here in this letter, stated that in the interests of the people who were suffering for food at that time, and as these chickens were dying, they would recommend that they be taken from the car.

Q. 13. By whom?

206 A. Be taken by the military authorities.

Q. 14. What if anything did this representative request or ask with reference to the disposition by you of the poultry?

Mr. Dick: We object to that because it assumes that the representative did ask something.

A. I told him that I would simply report the matter to the Commanding General. I didn't have any authority to make a decision of the matter. But this last sentence here is really just an opinion.

Q. 15. You state in this letter that is before you "Before I had an opportunity to call the C. H. & D. people, their representative called general headquarters in regard to this car, and asked if we would not take the chickens and distribute them among the hospitals"—you made that statement in this letter?

Mr. Dick: I want to object to that question, as an effort of the plaintiff to impeach his own witness.

A. Yes sir.

Q. 16. You may now state what was said by this representative to you, that called you up?

Mr. Dick: Defendant objects to the question on the ground that the identity of the alleged agent and his agency has not been sufficiently shown.

A. He said "There is a carload of chickens on our siding in North Dayton which we are unable to move. We have just been informed that they are dying—that there is no food for them" and that he thought it was best that the military authorities take over those chickens and distribute them among the poor—the hospitals.

Q. 17. Did you report that to General Wood?

A. I did. But before—but almost immediately afterward he was called by Colonel Vollrath.

Q. 18. Do you know how many times the agents of the C. H. & D. called up headquarters with reference to this car of poultry?

A. I only know of one time—that is when I talked. After that the matter was out of my hands.

Q. 19. How soon after this telephone conversation that was had

with you by the representative of the Railroad Company did General Wood take action?

A. I don't know.

Q. 20. You don't remember?

A. No sir. I understood afterward that the car had been taken over, but I don't know the exact time. There was so many
207 other things coming up at that time, we were practically working day and night.

Q. 21. Are you a Colonel—have you any military title?

A. First Lieutenant.

Q. 22. To get it squarely before you, Lieutenant Clark, is it correct or true that the representatives of the Railroad Company requested you to take the chickens and distribute them?

A. Now I said to the agent, I said, "Do you recommend that we take those chickens?" They said they would recommend it. I remember asking that question over the phone, because he knew more about the condition of things than we did.

Q. 23. It was not until after that time that any action was taken in the matter?

A. Not until after this telephone, no sir.

Q. 24. Now, do you know the name of the agent—did the agent give you his name that was talking to you?

A. No sir—he said "This is the freight agent talking."

Q. 25. Freight agent, or someone in the freight agent's office?

A. He said "This is the freight agent talking of the C. H. & D."

Q. 26. You hadn't any doubt but what that was correct?

A. No, because I was just getting ready to call him up, as I state in that note.

Cross-examination.

By Mr. Dick:

Q. 27. Lieutenant, are you commissioned as an officer of the Ohio National Guard?

A. Yes sir, in the Third Ohio Infantry.

Q. 28. As a first Lieutenant?

A. Yes sir.

Q. 29. Of course, you had no means of knowing this person who called up, except what he said to you?

A. No sir.

Q. 30. You didn't know his voice, or any other means of knowing him, and you had only the one conversation?

A. That is all, sir.

Q. 31. Lieutenant, will you tell us how this matter of the car of poultry came up—what first brought it to your attention?

A. It was about the middle of one afternoon when I was
208 called to the phone and found that it was Colonel Vollrath talking. Both General Wood and Captain Meade were out. The Colonel said that there was a carload of chickens marooned——

Mr. Gilbert: We are objecting to any statement by Colonel Villrath to the witness.

Q. 32. Proceed.

A. Was marooned in North Dayton—that he had just been informed that the car had been abandoned by a man who said he was unable to procure food. And I asked him what he would recommend and he said that we should get in touch with the railroad people at once. He said the chickens were dying and even—well, from a sanitary point of view they should be gotten rid of. Before I had an opportunity to call the C. H. & D. their agent called up.

Q. 33. Now, Lieutenant, without undertaking to repeat the words that were said to you by Colonel Vollrath—I understand that you knew his voice?

A. Oh, yes sir—yes indeed.

Q. 34. I will ask you if you received information from him by telephone to this effect—that the car of poultry in question was marooned at North Dayton, so that it could not be moved away from there?

Mr. Gilbert: We object to this question as repetition.

Q. (continuing.) That the chickens were dying, that there was a lack of food for them, and that it was Colonel Vollrath's recommendation that they be used, and he further recommended and suggested to you that you call up the railroad to secure corroboration of his statement?

A. That is right, sir.

Q. 35. Do you remember, Lieutenant, whether after this first conversation with Colonel Vollrath, and your conversation with the man who said he was the agent at the C. H. & D. freighthouse if you had any further investigation made by anyone before there was any action taken?

Question objected to by the plaintiff.

A. I didn't have any connection with it at all after, sir. My connection with it ended with that telephone call from the C. H. & D. agent.

Q. 36. And this conversation with Colonel Vollrath?

A. Yes.

209 Redirect examination.

By Mr. Gilbert:

Q. 37. Lieutenant, you don't know anything about the fact as to the question of feed, or the abandonment by the man in charge, except what was reported to you?

A. That is all, sir.

Q. 38. You have no special knowledge on that subject?

A. Just as reported by Colonel Vollrath.

Q. 39. And if that was not correct, you don't know anything about it?

A. No sir.

Q. 40. Was this conversation with the agent of the Railroad in the morning or afternoon?

A. It was in the afternoon, sir—just following the conversation with Colonel Vollrath.

Q. 41. And the agent stated to you that he would recommend that you take the poultry and distribute them among the hospitals?

A. As they were unable to move them, yes sir.

Recross-examination.

By Mr. Dick:

Q. 42. Lieutenant, I overlooked asking you this—about that time it was quite a common occurrence to have conversations and reports relative to supplies of food?

A. Almost constantly. I issued all the permits for anything like that to enter the city. Nothing could be brought in or taken out without a pritten permit from our office, no matter what it was; and for that reason a car could not be moved without a permit from our office. And I usually issued all those permits.

Mr. Gilbert: We object to the answer and move it be stricken out.

Q. 43. And do you remember, Lieutenant, how supplies of food were distributed to the flood sufferers—whether that was also on the orders of the military department?

A. Under our commissary department.

210 *Deposition of I. D. Pugh.*

ISAAC D. PUGH, a witness on behalf of the defendant, of lawful age, being by me first duly sworn as hereinafter certified, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Will you please state your name?

A. Isaac D. Pugh.

Q. 2. And where do you live, Mr. Pugh?

A. Columbus, Ohio.

Q. 3. And what is your business here?

A. I am now treasurer for the Red Cross Ohio Flood Commission.

Q. 4. And how long have you had that position?

A. I have had that position since the 16th of May, 1913.

Q. 5. In that capacity have you anything to do with making up of checks and remittances for awards of money for supplies used for the relief of sufferers from the floods of 1913 in the vicinity of Dayton?

A. Yes sir.

Q. 6. I will ask you, Mr. Pugh, if you remember of a case of a claim by the Collins Produce Company of Mount Vernon, Illinois,

for the taking of a carload of poultry at Dayton, in the flood, the latter part of March, 1913?

Mr. Gilbert: We object to that for the reason that it is wholly immaterial what may have been done by the Flood Committee, or by Mr. Begg before that committee.

A. I remember that there was a claim filed by the Collins Produce Company for a carload of poultry that they said was confiscated for flood relief purpose at Dayton along about that time.

Q. 7. And I will ask you, Mr. Pugh, if any notice of award reached you from any Board that heard or investigated that claim?

A. We received a finding from the committee of military officers of the Dayton military district, Dayton, Ohio, for all claims.

Mr. Gilbert: I object to the finding of the committee of military officers.

The Court: Objection sustained.

Mr. Whitnel: This deposition goes on to say that these people filed a claim and this committee made an award.

211 The Court: I don't care anything about that—I ruled on that once before—I said if you could show that they received the money, it would be proper, but unless they did, this would be no defense to this suit.

*Deposition of S. E. Neff.*

SAMUEL E. NEFF, a witness on behalf of the defendant, of lawful age, being by me first duly sworn as hereinafter certified, deposes and says as follows:

Direct examination.

By Mr. Dick:

Q. 1. Your name is Samuel E. Neff?

A. Yes sir.

Q. 2. And where do you live?

A. 169 West Eleventh Street, Columbus, Ohio.

Q. 3. What is your business here, Mr. Neff?

A. I am a student here—a law student, and Secretary of the Columbus Real Estate Board.

Q. 4. Have you any connection with the military establishment of the State of Ohio, the Ohio National Guard?

A. Not now—I used to have.

Q. 5. Did have in March, 1913?

A. Yes sir.

Q. 6. In what capacity?

A. I was a First Lieutenant in Company A.

Q. 7. Of what regiment?

A. Eighth.

Q. 8. And where was that stationed?

A. In North Dayton, during the flood.

Q. 9. In North Dayton, Ohio?
A. Yes sir.
Q. 10. During the flood in the latter part of March, 1913?
A. Yes sir.
Q. 11. And who was your Colonel?
A. Colonel Edward Vollrath.
Q. 12. Do you remember a carload of poultry said to belong to the Collins Produce Company that was sidetracked on the Cincinnati Hamilton & Dayton Railroad in North Dayton during this flood?
A. Yes.
Q. 13. Whereabouts were you stationed with reference to that car, Lieutenant?
212 A. Our station was in the United Brethren Church, about two blocks from this car; but our guard headquarters proper was right on the corner of the railroad and Leo Street, next to the car. They kept switching back and forth, but we were within a hundred yards of it all the time.
Q. 14. Do you refer now to the place where the car was when the poultry was distributed, or where it was when the high water first came?
A. I don't know anything about where—I refer to the time when it was distributed. I don't know where it was when the high water came.
Q. 15. Well now, during the time the car was at Dayton during this flood, do you know anything about any of the poultry dying?

Question objected to by plaintiff.

A. Yes sir.
Q. 16. And tell us about that, Lieutenant—to what extent the fowls died, and what was done with them, if you observed?

Question objected to by plaintiff.

A. I haven't any idea as to the number that died. I only know that we had our men take the carcasses down and throw them in a couple of burning coal cars, supposed to have been set on fire by spontaneous combustion, and burned up the dead chickens and turkeys that way. I know there were a couple of turkeys in the outfit.

Motion by plaintiff to strike out answer.

Q. 17. Did you see anything of the man in charge of the car?

Question objected to by plaintiff.

A. Yes sir.
Q. 18. And when did you first see him—was it before the military took charge of the car, or afterward?
A. Afterward.
Q. 19. And tell us, if you know, what was done with this poultry—that is, the fowls that didn't die?

Question objected to by plaintiff.

A. Why, it was issued on the order of Colonel Vollrath or any officer above him, and I think it was the Red Cross that had the system of a card for every family, and they would punch it when they received rations, and then sent them down. As they received a chicken the Sergeant cut off the corner of the card to show that family had a chicken.

Q. 20. And what officer of the Ohio National Guard was in
213 charge at the car at the time those chickens were given out to the flood sufferers?

Question objected to by plaintiff.

Q. 21. That is, were you there, or was someone else?

A. There were several of us there.

Q. 22. What I want to get at, were you there in person and saw for yourself how these fowls were thus distributed?

A. I saw it, yes.

Q. 23. You know that from your own personal knowledge?

Question objection to by plaintiff.

A. Yes sir.

Cross-examination waived.

*Notary's Certificate.*

Certificate to Depositions.

STATE OF OHIO,
*County of Franklin, ss:*

I, Joseph C. Nailor, a Notary Public in and for the County and State aforesaid, duly commissioned and qualified do hereby certify that the above named, George H. Wood, E. O. Clark, Isaac D. Pugh and Samuel E. Neff, were by me each first duly sworn to testify the truth, the whole truth and nothing but the truth; that the said depositions were taken in shorthand and reduced to writing by L. C. Dillon, pursuant to the agreement and stipulation hereinbefore set out; and also so written in the presence of the witnesses aforenamed, and were taken at the time and place in the attached agreement specified, and pursuant to said agreement.

I Do Further Certify that I am no counsel, attorney or relative of either party, or otherwise interested in the event of this suit.

In Witness Whereof, I have hereunto set my hand and seal of office this twenty-ninth day of April, A. D. 1914.

JOSEPH C. NAILOR,
*Notary Public, Franklin County, Ohio.*

214 Mr. Dick: Defendant offers in evidence the following depositions.

The Court: I don't desire to be arbitrary about it, but at the same time the Court has a right to protect itself against a flood of this sort—you may proceed.

The caption, reading of which is waived, is as follows:

In the District Court of the United States, Eastern District of Illinois, March Term, A. D. 1914.

No. 915.

COLLINS PRODUCE COMPANY

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

It is hereby agreed by and between the plaintiff, Collins Produce Company, and the defendant, Chicago and Eastern Illinois Railroad Company, that the depositions of C. H. Huston, Frank Beverstock and of other witnesses on behalf of the defendant shall be taken in the above cause upon oral interrogatories before Van C. Cook, a Notary Public, by a stenographer, in his office at 67½ Main Street, in the City of Mansfield in the County of Richland in the State of Ohio, commencing at nine o'clock A. M. on Wednesday, April 29, 1914, at which time and place it is agreed that the plaintiff may also take the depositions of witnesses in said cause in its behalf, on oral interrogatories.

It being understood and agreed by the parties to this suit that all notices and legal formalities relative to the taking of such depositions are hereby waived.

Dated this 16th day of April, A. D. 1914.

G. GALE GILBERT,
*Attorney for Plaintiff.*
HOMER T. DICK,
*Attorney for Defendant.*

*The Depositions of William V. Hartman, Charles H. Huston and Frank Beverstock, Taken at the Office of Van C. Cook 67½ North Main Street, in the City of Mansfield, Richland County, Ohio, Pursuant to Stipulation Between the Parties Attached Hereto.*

Mr. Dick reads as follows:

215 *Deposition of W. V. Hartman.*

WILLIAM V. HARTMAN, being first duly sworn, deposes and says:

Direct examination.

By Mr. Dick:

Q. 1. Mr. Hartman, will you please state your name?
A. William V. Hartman.
Q. 2. Mr. Hartman, where do you live?
A. 63 Wood Street, Mansfield, Ohio.

Q. 3. Have you always lived here?
A. Born and raised here.
Q. 4. Mr. Hartman, you may state your occupation?
A. Slinger of booze—bartender.
Q. 5. How long have you been with your present employer?
A. I have been with my present employer about nine years.
Q. 6. Are you a member of the Ohio State Militia?
A. Yes sir.
Q. 7. And if so, what Company and regiment do you belong to?
A. Company M, 8th Regiment, Ohio National Guards.
Q. 8. If you have any office in connection with the Militia, what is it?
A. I had the office of Quarter Master Sarge-nt—they took me off that and put me in Schad's place.
Q. 9. Were you so connected with the militia at the time of the Dayton flood in March, 1913?
A. Yes sir.
Q. 10. Did you go to Dayton during the flood?
A. Yes sir.
Q. 11. What part of Dayton were you personally stationed in at that time?
A. I was stationed in the United Brethren Church, Troy Street.
Q. 12. Is that what is known as North Dayton—out in that part of the town where there is some gardening done near the railroad tracks?
A. Yes sir.
Q. 13. When you got to that place, I will ask you if you saw there a carload of poultry sidetracked on the tracks of the Cincinnati, Hamilton & Dayton Railway Company?
A. Yes—I do not know what railroad, but on the railroad tracks, but I do not know what ones.
Q. 14. Well, was it with reference to some merchandise
216 train that had been sidetracked there—was it one of the cars?
A. They were mixed among other cars.
Q. 15. What do you remember, if anything, about two or more car loads of hogs that were in the same train?

Objected to by plaintiff.

A. There were a couple of loads at the lower end of the train.
Q. 16. Now, when you got to Dayton, did you find anyone in charge of this carload of poultry at the time?

Objected to by plaintiff.

A. No sir.
Q. 17. Then what, if anything, did you soldiers do with reference to feeding and caring for the poultry?

Objected to by plaintiff.

A. We had information the poultry were starving and no one was in charge and we had orders to feed the poultry.

Plaintiff moves to strike the answer out.

Q. 18. Did you feed the poultry?

Objected to by plaintiff.

A. We hired a man to look after them.

Q. 19. Now the soldiers, or someone placed by them to look after the poultry, did you observe how they got into the cars to do that work?

Objected to by plaintiff.

A. They broke the lock and got in—the fellow *me* hired took a lock of *t*his own.

Plaintiff moves answer to be stricken out.

Q. 20. What did you notice, if anything, from the time you first got there as to whether any of the fowls in this car were dying or in bad condition?

Objected to by plaintiff.

A. Well, they were in pretty bad shape; there were a great many dead, and some were sick.

Q. 21. Who was Colonel of your regiment in charge there at North Dayton?

A. Colonel Vollrath.

Q. 22. Now later on Mr. Hartman, what was done with this car of poultry?

Objected to by plaintiff.

A. Well we got corn and had them fed and when we thought they were in pretty good shape, we handed the chickens out to the people who needed them.

217 Q. 23. Did you at any time while there see a man who was in charge, the caretaker, a man named Thomas Shipley?

(Objected to by plaintiff. Witness has already stated there was no one in charge of the car.)

A. Seen him two or three days after—I do not know his name—he talked and said he had charge of the car.

Q. 24. And I will ask you Mr. Hartman, if at the time this man came back, if from that time on while he was with you, there was another man living in the neighborhood also doing some work in taking care of the work?

Objected to by the plaintiff.

Q. 25. Or the man you spoke of as being placed in charge by the soldiers?

A. The fellow we hired is the only one—I do not know his name—never heard.

Q. 26. What I want to get at Mr. Hartman, is, was this man that

you soldiers placed in charge a man who lived in the neighborhood of North Dayton?

Objected to by plaintiff.

A. He was a man who lived along the tracks.

Q. 27. Now when this poultry was distributed among the flood sufferers I will ask you if you had anything to do with that work?

Objected to by plaintiff.

A. Well I had charge of handing them out and cutting the ends off the tickets to show each and every one got chickens.

Q. 28. Tell me Mr. Hartman, how it was done, how the distribution was made—if the persons needing relief presented any ticket or card, and what you did to show they had received a supply?

Objected to by plaintiff.

A. Well it just depended on how many they had in the family—it was marked on the ticket. It depended on the number—if there were four in the family we gave one chicken and if there were from six to eight we gave them two chickens.

Q. 29. Now when you actually unloaded the car of poultry did you find any more dead or sick chickens?

Objected to by plaintiff.

A. Well probably there were about 100 dead ones and about 25 or 30 sick ones—we gave the sick ones to the fellow who had charge of the car, the man we hired to take care of the car.

218 Q. 29. Do you remember Mr. Hartman of seeing any corn brought to that car by the soldiers and used to feed the chickens before the car was actually confiscated, and you started to distribute the chickens to the flood sufferers?

Objected to by plaintiff.

A. We had a wagon to haul corn to car and then unloaded.

Q. 30. Did you see that done?

Objected to by plaintiff.

A. Yes sir.

Q. 31. Now Mr. Hartman, with reference to the condition you found, and no one being in the car when you arrived there, and the chickens needing feed and their conditions, I will ask you to state if reports were made of those things to Colonel Vollrath in charge of the regiment?

Objected to by plaintiff.

A. Yes they laid in complaints about the poultry being there starving and needing care. Colonel Vollrath sent somebody down to look after them, who reported the chickens were in bad shape—then he ordered them to take charge.

Plaintiff asks that answer be stricken out.

Q. 32. Mr. Hartman are you sometimes known among the soldiers as 'Red'—you are the man referred to in that way?
A. Yes sir.

Cross-examination.

By Mr. Gilbert:

Q. 1. I believe you answered Mr. Dick that your business for sometime had been that of the booze business?
A. Yes sir, I am a bartender.
Q. 2. What day did you get into Dayton?
A. I could not just say what day.
Q. 3. What day did you begin to fatten the poultry?
A. About two days after we landed in there.
Q. 4. What day did you take charge of the car, if you took charge?
A. I did not mark it down, don't know just what day. I can't remember as there was too much excitement.
Q. 5. Are you willing to state that a man accompanying that car failed to feed and water the chickens of your own personal knowledge?
A. At the time they were in the flood, yes sir.
Q. 6. Did you stay with that car at all times after you arrived in Dayton?
A. No sir, not all of the time, we locked it up at night.
219 Q. 7. I am asking prior to the time you claim you broke the lock?
A. No sir.
Q. 8. Will you please explain how the man you hired fed and watered those chickens before you took charge of the car?
A. He did not water and feed them before.
Q. 9. Who did?
A. Nobody did until they broke into it.
Q. 10. *Now* many days, will you state it was no one fed and watered the chickens prior to your breaking into the car?
A. I could not tell just when the car was broken into.
Q. 11. The truth is, you do not know who fed and watered the chickens prior to the time you broke into the car?
A. No, I did not feed and water until after we broke into the car.
Q. 12. Why did you state that no one fed and watered the chickens prior to that time, during your examination in chief?
A. I did not say that I seen nobody feed or water before we broke into the car but after we broke into the car.
Q. 13. Why did you state in your examination in chief that no one fed or watered the chickens prior to time you broke into the car?
A. Did I say that?
Q. 14. Please answer that question.
A. I did not say I seen anybody feeding or watering the poultry before breaking into the car.

Q. 15. Why did you state in your examination in chief in this case that no one fed or watered the chickens prior to your breaking into and taking charge of the car?

A. I did not say that—I said I did not see anyone until we broke the lock, then I saw them watered and fed.

Q. 16. You do not mean to state that the chickens had not been fed and watered prior to the time you took charge of the car and broke into it?

A. At the time I took charge they were fed and watered.

Q. 17. Repeat that again.

A. At the time they were fed and watered.

Q. 18. Were they fed and watered before?

A. I do not know anything about it, as I was not there.

Q. 19. You do not mean to state what happened or took place before you know nothing about it, prior to the time you spoke of, having taken the car?

220 Objected to by defendant.

Q. 20. You are not willing to state anything at all with reference to the car prior to the time you took possession?

A. Only when we had orders to take charge of the car, that is all.

Q. 21. You know nothing about the car prior to that time?

A. No sir.

Q. 22. And anything you may have stated in your chief examination to the contrary, was not intended?

A. Only when they took charge of the car.

Q. 23. You know nothing about what was done prior to the time you took the car?

A. Not before but after I took the car.

Q. 24. The testimony you have given in chief as referring to this case was done after the car was taken—is that right?

A. Yes sir.

Q. 25. After you took the car you say you hired a man?

A. Colonel Vollrath hired him, I didn't.

Q. 25. Were you present?

A. No not at the time.

Q. 27. You have no personal knowledge of his employment?

A. Colonel hired him.

Q. 28. Were you present?

A. No sir.

Q. 29. Then how can you have any personal knowledge?

A. I could not be around every place, I heard them say that the Colonel hired him.

Q. 30. The corn that was hauled to this car you speak of was taken there after the militia had taken charge of the car?

A. Yes sir.

Q. 31. You had not fed the chickens prior to that time?

A. Not to my knowledge.

Q. 32. How many days were you engaged in the disposition of this poultry?

A. Between five and six days.

Redirect examination.

By Mr. Dick:

Q. 1. Mr. Hartman, Mr. Gilbert asked you what day you got to Dayton—did you go there in the same company with Mr. Houston and Lieutenant Beverstock?

A. Mr. Houston was with the regiment.

Q. 2. How about Lieutenant Beverstock?

221 A. Lieutenant is on the Major's staff—Captain Bra[illegible]rd was Captain of our Company.

Q. 3. Well did you men connected with Colonel Vollrath's regiment all go out to North Dayton about the same time?

A. No not all, sir, some came on the day after.

Q. 4. Mr. Gilbert asked you about the time that the soldiers took charge of this car—I will ask you Mr. Hartman if it is not a fact that the soldiers took charge of all the property in cars that were sidetracked along there and commenced to guard them as soon as they arrived?

Objected to by plaintiff.

A. They did sir, just as soon as they could get in shape to take charge of them.

Q. 5. Am I correct in understanding you, that it was several days after you arrived before the poultry was moved down and you commenced the distribution of them?

Objected to by plaintiff.

A. It was not several days, it was three or four days afterwards that we started to hand the poultry out—we were afraid the people would get killed so we had the car moved up towards the street.

Plaintiff moves to strike out answer.

Q. 6. Perhaps we can get at it in this way Mr. Hartman—after the lock was broken and the soldiers took charge of the car of poultry, was there an interval of three or four days after that before you commenced to use the poultry for distribution among the flood sufferers?

Objected to by plaintiff.

A. Yes sir.

Recross-examination.

By Mr. Gilbert:

Q. 1. You arrived in Dayton on March 28th, did you not?

A. I do not remember when we arrived but we got there.

Q. 2. The car was turned over to the militia or taken by them on the 31st day of March, was it not?

A. I could not tell you, I do not know the date.

Q. 3. You began the distribution of that poultry on the same day, did you not, the 31st day of March?

A. I could not say what date we took charge of the car.

Plaintiff moves to strike out answer and asks witness to answer question.

A. We took charge of the car but I do not know what date it was, I did not mark it down.

222 Q. 4. You began the distribution of that poultry on the same day, did you not, the 31st day of March?

A. I do not know the date but I took charge of the car.

Q. 5. I have not asked you that sir—please read the question to the witness again and see if he will recall.

A. I told you I do not know whether it was the same day or not—I did not mark the date down when I took charge of the car.

*Deposition of C. H. Houston.*

CHARLES H. HOUSTON, being first duly sworn, deposes and says:

Direct examination.

By Mr. Dick:

Q. 1. Will you state your name Mr. Huston?

A. Charles H. Huston.

Q. 2. Mr. Huston, where do you live?

A. In Mansfield, Ohio.

Q. 3. What is your business?

A. I am an attorney.

Q. 4. How long have you lived in Mansfield?

A. I have lived in Mansfield seventeen years.

Q. 5. Are you connected with the militia of the Ohio National Guard?

A. I am, yes sir.

Q. 6. Were you in March 1913?

A. Yes sir.

Q. 7. In what capacity.

A. Why I was Quarter Master of the regiment and in the absence of Captain Merkel, I was detailed as Commissary Officer of the regiment in addition.

Q. 8. Will you please state the number of the regiment and the Colonel in command?

A. Eighth Infantry—Colonel Edward Vollrath, Commander.

Q. 9. How did you get to Dayton and about what time did you arrive there?

A. We left Mansfield on Wednesday morning for Lima over the Pennsylvania Railroad and from Lima went to Troy Wednesday night. I was left in charge of the provisions and regimental equipment. We succeeded in getting that across the bridge at Troy Thursday and Friday and on Saturday morning we rode into North Dayton.

223 Q. 10. Was that the usual route of travel or was there an interruption of the ordinary railroad facilities for getting into Dayton at that time?

Objected to by plaintiff.

A. It was not the usual route that we traveled usually from Mansfield to Dayton—this route was taken on account of the flood.

Q. 11. In getting from Troy to Dayton, did you notice whether or not the Cincinnati, Hamilton and Dayton Railroad north from Dayton was being operated?

Objected to by plaintiff.

A. It was not.

Q. 12. And did you observe anything as to the condition of the tracks and bridges to prevent operation at that time—if so, will you tell us what it was?

A. At Troy the north pier of the bridge was washed out and trains could not cross, and from Troy south for about one and one half miles, the track was washed out practically all of the way so trains could not pass over it. I did observe the track from that point to the north of Dayton, about one mile of the tracks of this railway were washed and removed in many places from the roadbed.

Q. 13. Now when you arrived in Dayton, what, if anything was done in the way of taking charge of any stores of food or material that could be used for food?

Objected to by plaintiff.

A. Well, after I arrived, upon instructions from the Colonel we took charge of practically everything in the cars, on the tracks of all of the railroads in North Dayton, in the nature of foodstuffs or wearing apparel.

Q. 14. Where were your headquarters?

A. Our headquarters were in the United Brethren Church on North Troy street.

Q. 15. Is that in North Dayton?

A. It is, yes sir.

Q. 16. Soon after you arrived at North Dayton, Mr. Huston, did you hear of a carload of poultry that turned out to be the property of the Collins Produce Company that had been stopped by the flood and sidetracked at North Dayton?

Objected to by plaintiff.

A. I heard of some poultry sidetracked some place northwest of the church.

Q. 17. And if any reports reached you about that poultry, will you tell us what they were?

224 Objected to by plaintiff.

Mr. Gilbert: We renew our objection to that.

The Court: Sustained.

Q. 18. Do you know what was done with the car after that?

Objected to by plaintiff.

A. Yes sir.

Q. 19. What was it?

A. The car was confiscated and the poultry unloaded from the car.

Q. 20. For what purpose?

Objected to by plaintiff.

A. For the purpose of feeding the people of North Dayton.

Q. 21. I will ask you, Mr. Huston, if North Dayton and vicinity were under the Government of ordinary civil authority or martial law?

A. Martial law.

Q. 22. As commissary there at North Dayton at the time of the confiscation of this car of poultry, and just before that, can you say whether or not there was any shortage of food stuffs for the purpose of sustaining the people, as well as the military forces in charge there?

Objected to by plaintiff.

A. There was to such an extent that the militia had distributed supplies they had taken with them for the purpose of feeding the troops.

Q. 23. And I will ask you, Mr. Huston, if any of the stores of food supplies belonging to individuals or in possession of railroad carriers were taken and used for similar purposes about the same time?

Objected to by plaintiff.

A. They took charge of everything in the nature of wearing apparel, clothing, and food for animals. That continued up until probably the middle of the week after I arrived there. I think I arrived about the 29th or 30th of March, on Saturday.

Cross-examination.

By Mr. Gilbert:

Q. 1. I believe you said you arrived in Dayton on Saturday?

A. Yes sir, Saturday morning.

Q. 2. That was March 29th?

A. It was the last Saturday of March—I think the 29th—I do not recollect the date, but I think it was the 29th. Yes it was the 29th.

225 Q. 3. Mr. Huston, the evidence you have given here with reference to this man and the feeding of this poultry prior to being taken over by the militia, you have based upon reports or upon your own personal knowledge?

A. Not upon personal knowledge—simply upon hearsay or reports—they came to me from others.

Q. 4. This car was turned over to or taken by the militia on Monday March 31st, was it not?

A. I have no definite recollection now as to the exact date—it was shortly after I arrived that I learned of the car.

Redirect examination.

By Mr. Dick:

Q. 1. With reference to the reports that were the source of your information regarding this car of poultry, were those reports of the soldiers that reached you in the usual conversation?

Mr. Gilbert: We object to that.

The Court: Sustained.

Q. 2. I will ask you if reports of this car and conditions existing were also made to the Colonel in charge in the usual course?

Objected to by plaintiff.

A. Yes sir.

Recross-examination.

By Mr. Gilbert:

Q. 1. What do you know, if anything, of the agents of the C. H. & D. Railway Company suggesting or requesting that the militia take and distribute this poultry?

A. I never heard anything of that kind.

Q. 2. You had no information on that subject?

A. None whatever.

*Deposition of F. Beverstock.*

FRANK BEVERSTOCK, being first duly sworn, deposes and says:

Direct examination.

By Mr. Dick:

Q. 1. Mr. Beverstock, please state your name?

A. Frank Beverstock.

Q. 2. Where do you live?

226 A. In Mansfield, Ohio.

Q. 3. How long, Mr. Beverstock, have you live- in Mansfield?

A. About fifteen years.

Q. 4. What is your present business?

A. I am in the moving picture show business.

Q. 5. Have you any connection with the state militia known as the Ohio National Guard?

A. I have, yes sir.
Q. 6. And did you have in the month of March, 1913?
A. I did, yes sir.
Q. 7. In what capacity were you connected with the Ohio National Guard at that time?
A. At that time I was first Lieutenant and detailed as Battalion Adjutant.
Q. 8. Did you go to Dayton at the time of the flood there in March, 1913?
A. Yes sir.
Q. 9. About what day of the week did you get into Dayton?
A. I got there on Friday morning.
Q. 10. Do you remember anything, Lieutenant, of a carload of poultry that was sidetracked in North Dayton on the tracks of the Cincinnati, Hamilton and Dayton railroad that was there at the time you reached Dayton?
A. Not at the time I reached Dayton.
Q. 11. When you arrived at Dayton, what part of the city or vicinity was made your headquarters?
A. North Dayton.
Q. 12. How long did you stay there?

Objected to by plaintiff.

A. I could not say positively—I think about two weeks.
Q. 13. *Not* Lieutenant, after your arrival at North Dayton, what if anything was done, if you know, in the way of guarding or taking charge of any property of cars on tracks of the railroads?

Objected to by plaintiff.

A. We took charge of all property on the railroads and placed guards over them.
Q. 14. While you were there at North Dayton, did you learn of the carload of poultry on the tracks of the C. H. & D. railway at North Dayton?
A. I did, yes sir.
Q. 15. Did you receive any reports about the car or its contents?

227 Objected to by plaintiff.

A. I did not receive any reports.
Q. 16. Did you receive any instructions with reference to it?
A. I did, yes sir.
Q. 17. What were they?

Objected to by plaintiff.

A. I was instructed to investigate the condition of the car of poultry and to report to Colonel Vollrath.
Q. 18. And from whom did you receive those instructions?
A. From Colonel Vollrath.
Q. 19. Do you remember about what day that was?

A. I do not want to say what day, I am not positive—I think it was on Monday.

Q. 20. When you received those instructions, what did you do if anything, in pursuance of them?

Objected to by plaintiff.

A. I investigated the car and advised confiscation.

Plaintiff moves to strike out answer.

Q. 21. When you speak of investigating the car, Lieutenant, I will ask you to state if you went to the car in puestion or sent someone to it?

Objected to by plaintiff.

A. I went in person.

Q. 22. Tell us what you found there.

A. I found that the man in charge of the car was out of feed—that the poultry in the car was dying, and that if it would ever be of any service to anyone, it would be necessary to use this poultry soon after the investigation.

Plaintiff moves to strike out answer.

Q. 23. At the time you so went to the car, Lieutenant, did you see any dead fowls there?

Objected to by plaintiff.

A. I did.

Q. 24. Now Lieutenant, after you made your report of your investigation, to your Colonel, if you did so report it, what was done after that?

Objected to by plaintiff.

A. My Colonel ordered me to confiscate the car, which I did at once.

Q. 25. And how was it then used?

A. After confiscating the car, I notified the people who issued the food in the bread line, not to have any fresh meat sent in from the slaughter house and informed them we would issue this car
228 of chickens the following day after confiscating.

Plaintiff moves to strike out answer.

Mr. Gilbert: We renew our objection to that.

The Court: Sustained.

Q. 26. And in connection with that, Lieutenant, can you tell us how you had gotten the meat supply about that time?

Objected to by plaintiff.

Mr. Gilbert: We renew our objection to that.

The Court: Sustained.

Q. 27. In connection with your investigation of the condition of this car of poultry, in pursuance of instructions from your Colonel, I will ask you to state whether or not you saw the man who was caretaker of the car?

Objected to by plaintiff.

A. I did, yes sir.

Q. 28. If you learned anything from him about the condition of these fowls or the shortage of feed, tell us what it was?

Objected to by plaintiff.

A. Well, he told me that he was out of money and could not find any more feed for the poultry.

Plaintiff moves to strike out answer.

Q. 29. Do you remember, Lieutenant, whether you took any steps to feed the poultry from that time on until they were used?

Objected to by plaintiff.

A. We did feed them.

Q. 30. And by 'we' do you mean the military authorities?

A. I do, yes sir.

Q. 31. I will ask you to state, Lieutenant, if I had not made that point clear, whether after making this personal investigation of the car of poultry and condition, you reported your findings to the Colonel, the Colonel commanding your regiment?

Objected to by plaintiff.

A. I did.

Cross-examination.

By Mr. Gilbert:

Q. 1. Do you know a farmer by the name of Kammer living in the neighborhood of where this car was sidetracked?

A. I do not.

Q. 2. Do you know whether on Sunday prior to your taking this poultry a Mr. Shipley purchased and had delivered to that car a load of corn?

229

A. I do not.

Q. 3. Do you know he did not?

A. I do not know.

Q. 4. Do you know that Mr. Shipley got feed for this poultry from Mr. Kammer on two occasions?

A. I do not.

Q. 5. Do you know he did not?

A. I do not.

Q. 6. You stated there was absolutely no feed in that car on Monday?

A. I am not positive that Monday was the day—I made the investigation.

Q. 7. You have stated already it was on Monday.

A. I stated I thought it was on Monday.

Q. 8. Did you not state from your own personal knowledge that there was absolutely no feed in the car the day you took it?

A. I did not.

Q. 9. Do you have, or do you not have any personal knowledge upon that point?

A. I have.

Q. 10. Then why is it you are not able to state there was no feed in that car on Monday when you took the car?

A. There was a very little feed—I should think about one half bushel of corn.

Q. 11. What time of the day on Monday would you state that there was only one half bushel of corn in that car?

Objected to by defendant.

A. I did not state the day was Monday.

Q. 12. What day was it?

A. I am not positive.

Q. 13. Will you say it was not Monday?

A. No sir.

Q. 14. Do you wish to state and will you state that at the time you took this car that it contained only one half bushel of feed?

A. In my judgment that was about the amount of feed that was in the car.

Q. 15. What was it?

A. It was corn.

Q. 16. Would you state now that was all the feed there was in the car?

230 A. That was all I saw.

Q. 17. Do you know whether there was any other feed in the car?

A. I do not.

Redirect examination.

By Mr. Dick:

Q. 1. Lieutenant there was one matter I overlooked—did you personally supervise the taking of the fowls from the car and their distribution.

Objected to by plaintiff.

A. I directed it myself.

Q. 2. At the time, I will ask you Lieutenant, what you observed as to whether there — any dead fowls in the car, or any that were sick or in unhealthy condition?

A. Do you mean at the time of the distribution?

Q. 3. Yes sir.

A. I did not observe any dead fowls at the time of the distribution.

*Notary's Certificate.*

Certificate.

The depositions of William V. Hartman, Charles H. Huston and Frank Beverstock of the County of Richland and State of Ohio taken by me in the case of the Collins Produce Company vs. The Chicago and Eastern Illinois Railway Company pending in the United States District Court for the eastern district of Illinois, pursuant to stipulation attached hereto between the parties.

Before giving said testimony, said witnesses were duly sworn and their signatures to said depositions were waived by the attorneys of said parties present at the time, G. Gale Gilbert as attorney for the plaintiff and Homer T. Dick, as attorney for the defendant.

[SEAL.] VAN C. COOK,
*Notary Public.*

Mr. Whitnel: Defendant offers in evidence statement signed by Colonel Vollrath, or receipt signed by Colonel Vollrath, showing that the military authorities had confiscated the chickens. It is a certificate given by the military authorities to the caretaker of the car at the time it was siezed by military authorities.

231 The Court: That has been abundantly shown by oral proof —it may be admitted.

The document is admitted in evidence and marked Defendant's Exhibit 3, and read to the jury, in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT 3.

(See Defendant's Exhibit 2, Page 186.)

Here the defendant rested its case.

Now be it Remembered that the plaintiff, to sustain the issues on its behalf, introduced the following evidence in rebutttal, that is to say:

*Testimony of T. Shipley.*

THOMAS SHIPLEY, call- as a witness on behalf of plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Gilbert.

Q. State your name.
A. Thomas Shipley.
Q. Where do you live?

A. Mount Vernon, Illinois.
Q. What is your business?
A. I have been in the service of the Collins Produce Company, running produce cars, a good while.
Q. In what capacity?
A. Taking care of them in transportation.
Q. How long have you been engaged in that business?
A. I can't tell you definitely—I have been engaged in it between four and five years
Q. Your business requires you to attend to the poultry in Illinois to points in New York and New Jersey?
A. Yes.
Q. You go along with the poultry and feed and water it?
A. Yes.
232 Q. How many cars—what has been the extent of your experience in that line?
A. I could scarcely answer that—I could estimate it, that is all I could do—from the time I have been in service, the number of cars I would estimate at 150 to 175 cars that I have had charge of.
Q. Were you the caretaker, Mr. Shipley, with the car in question?
A. Yes sir.
Q. What were your duties?
A. To feed and water and take care of them as well as I could.
Q. What authority did you have in reference to controlling the car?
A. Controlling the car?
Q. Yes.
A. I don't know that I understand.
Q. Did you have any other duties other than feeding or watering the produce.
A. No sir.
Q. Someone has spoken about the question of feeding—where did you start with this car?
A. Mount Vernon, Illinois.
Q. You were with the car at Dayton, Ohio?
A. Yes sir.
Q. You may state about the kind or quality of feed that you had.
A. I really don't remember the exact number of bags of feed, but on a trip of that kind we usually start with about five thousand pounds of feed——

Mr. Dick: I object to that answer.
The Court: I don't think it is rebuttal.

Q. After arriving in Dayton, what was your experience in reference to feed.
A. I don't believe I get you.
Q. I will ask you what you did with the poultry after you reached Dayton.
A. I fed it and cared for it?
Q. How often did you feed it?

A. Twice every day.
Q. Did you have feed?
A. I had feed up until Sunday.
Q. Did you get more feed on Sunday?
233 A. As soon as I seen I was going to run out, I got feed on Saturday to feed with Sunday.
Q. Did you have arrangements to obtain more feed?
A. Yes.

Mr. Whitnel: I object to that answer as stating a conclusion.
The Court: He has answered that he got feed—it may stand.

Q. From whom did you obtain feed in Dayton?
A. Farmer near by.
Q. Do you know a man by the name of Nies?
A. Yes.
Q. Did he assist you during the time you were there in feeding and watering the poultry?
A. Yes.
Q. What condition was that poultry in at the time the militia took it?
A. Good.
Q. From your experience, Mr. Shipley, in the transportation of live poultry, from the west to the east, what percentage, if any, of the fowls are lost generally?

Mr. Whitnel: I object to that—it is not material.
The Court: It is this carload, and not generally—of course we all know now that the transmission of this car was unusual—it is not an ordinary case—there was a flood there, so the ordinary percentage of loss would not be any criterion in this case at all.

Q. If the shipment was held, if the poultry was held there in the car for as much as two weeks, what would be the percentage of loss?

Mr. Whitnel: I object to that—that would not be under conditions that existed here.
The Court: He may answer.

A. Well, that is an awful hard question to answer because there is nary a two that carries alike.
Q. How is that?
A. I say that would be an awful hard question to answer because nary a two of them carries alike.
Q. What is your judgment?
A. I have carried cars that had a death rate as low as seven and I have had them that would average around sixty or seventy.
Q. How long have you held poultry standing in live poultry cars?

234 Mr. Whitnel: I object to that.
The Court: I don't think that is material in this case—it is this carload that we are trying, and this was subjected to unusual conditions.

Q. I will ask you how many fowls had died, if any, at the time the militia took this car?
A. Twenty one is my memory.
Q. Twenty one head?
A. Yes.
Q. I will ask you whether there was anything unusual about the number that had been lost at that time?

Mr. Whitnel: I object to that question—it calls for a conclusion of the witness as to whether or not there was anything unusual.
The Court: I don't think that is a proper question in this case.

Q. It has been intimated by some deposition that you had abandoned this car of poultry.

Mr. Whitnel: I object to that.

Q. I will ask you whether or not, prior to the time the militia took charge of this car of poultry, you abandoned it at any time.
A. No sir, I never.
Q. Did you make any statement to anybody that you intended to abandon it?

Mr. Whitnel: I object to these direct questions.
The Court: He may answer that.

A. None that I ever remember of?
Q. Did you intend to abandon it?
A. I had no thought of it.
Q. Did you talk with Mr. Groves or some railroad agent about this poultry?

Mr. Dick: We object to that unless the agent is identified.
The Court: The question is too broad—if he talked with Grove he may state—leave out 'some agent.'

Q. Answer about Groves.
A. I don't know whether it was Groves or not.
Q. What was his business—what was his position?

Mr. Dick: We object to that—agency could not be proven by the statement of the agent alone.
The Court: Before you can prove what an agent says or does, you must prove agency—that is the first thing.

Q. Where was the gentleman that talked to you?
A. He was down at the office—the freight house.
235 Q. What house?
A. The C. H. & D.
Q. Where?
A. Dayton, Ohio.
Q. What was the man's business?
A. All I know he said he was the agent there.
Q. You talked with this man about the poultry?
A. Yes.

Q. What conversation did you have?

Mr. Dick: I object to that—that is no way to prove agency.
Mr. Whitnel: And it is not rebuttal.
The Court: That is not the way to prove agency—anybody might say that.

Q. I believe a witness by the name of Smith said you said to him that you wanted the militia to take the car—you wanted to turn it over to him—I will ask you if you made that statement?
A. I never made that statement that I can call to mind,
Q. Another witness stated that you said you didn't have any money to buy any feed—what do you say about that?
A. I don't remember of making that remark at all.
Q. Did you have money?
A. Yes.
Q. Did you have a shipper's contract or attendant's contract with the Railroad Company?
A. Yes.
Q. Have you got that?
A. No sir.
Q. You have not?
A. No sir.
Q. You didn't keep it?
A. No sir.
Q. What was the condition of the poultry at the time you took it as to being healthy or unhealthy?
A. I considered it a good car.

Cross-examination waived.

236 *Testimony of J. C. Begg.*

J. C. Begg, recalled as a witness on behalf of plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct examination.

By Mr. Gilbert:

Q. How long experience have you had in the transportation of live poultry from Illinois to New York?
A. Seven and one half years.
Q. In that time how many cars have you handled, in your judgment?

Mr. Whitnel: I object to that.
The Court: I don't think that makes any difference—it is not rebuttal.

Q. I will ask you this question—from your experience in the transportation and handling of live poultry from Illinois to New York what length of time or how long can it be safely held within the car in which it is shipped?

Mr. Dick: I object to that—it does not throw any light on the issues in this case and is immaterial.

Mr. Gilbert: Our purpose is to show that the poultry might be held indefinitely in this car with safety.

The Court: I don't think it would be very material in this case if it could—that was not what destroyed it.

Mr. Gilbert: We will withdraw the witness.

Here the Plaintiff rested its case in rebuttal.

The above and foregoing is all of the evidence offered on the trial of this cause.

And now comes the defendant, Chicago & Eastern Illinois Railroad Company, by Whitnel & Browning, and Homer T. Dick, its attorneys, and at the close of all the evidence in the case, moves the Court to exclude the evidence and direct a verdict in favor of the defendant, and in this behalf submits and requests the Court to charge the jury as follows:

The jury are charged to return the following verdict:

"We, the jury, find the defendant not guilty." Refused.

The Court: In the case of the Collins Produce Company versus the Chicago & Eastern Illinois Railroad Company, a motion was made and submitted asking for a directed verdict.

First, it is contended that this is a contract of insurance—I don't think it is such a contract, but of course you have read these conditions altogether—of course if you took the second para-
237 graph and the succeeding paragraph it might be so construed, but it must all be read together—the second paragraph provides that no carrier shall be liable for loss not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law. The Carmack amendment imposes liability there, as read, and it clearly has reference to that law, and excepts the liability provided for by that law, and that is the liability that a road may defend against. That disposes of that.

I don't care to discuss this case extensively, as there is only one point in the case that I think I ought to submit to the jury. If this property was destroyed by the military authorities of the State of Ohio—that was a de facto government, whether it was a legal one or not—if that de facto government seized this property of their own volition by force and disposed of it, this defendant is not liable and I will so instruct the jury. There is only one phase of this that the jury ought to determine, and that is the only issue I will submit to the jury, and that is, whether this property was voluntarily turned over to the military authorities by this connecting road, the Cincinnati, Hamilton & Dayton—if they surrendered the property voluntarily, if it was not taken away from them by force, if they notified the authorities there to seize it and dispose of it, if they should so find, I think this defendant company will be liable, as it had no right to do that. It had no right to resist the taking of the property by force—they couldn't do that—all they needed to do

would be to be submissive—but if they voluntarily notified these people there and by reason of such notification, the military authorities did seize this property and dispose of it, then I think they are liable for whatever it would be worth at the time. Of course it had been somewhat deteriorated—that would be for the jury to determine. Therefore I will overrule the motion.

Mr. Whitnel: Exception.

Thereupon the Court charged the jury as follows:

*Charge to Jury.*

Now, gentlemen of the jury, the plaintiff in this case seeks to recover against the defendant for the loss of a carload of poultry described in the evidence. When the defendant gave the receipt or bill of lading which had been introduced in evidence in this case, for the transportation of this property from the State of Illinois and State of Indiana to the State of New Jersey, the law cast upon
238 it the liability of the property being destroyed or lost or damaged by it on its own road, or by any connecting carrier on its road.

The law makes the connecting carrier in an interstate shipment the agent of the initial carrier, and if the loss is caused by one of the other carriers, as in this case, if the loss was caused by the Cincinnati, Hamilton & Dayton railroad, in whose possession it was when it was destroyed—I say if that road caused this property to be damaged or destroyed, this defendant would be liable to the shipper for that loss, the law providing that if it is compelled to pay for that loss, it has its remedy against the Cincinnati, Hamilton and Dayton Railroad Company.

The evidence here is hardly disputed, so far as the flood is concerned, or the intervention of the military authorities of Ohio.

If, by reason of the flood the Governor of Ohio called out the militia and declared martial law in Dayton and Montgomery County, that became a de facto government that took control of the operation of the government at that place. The defendant would not be responsible for anything they did, and if the military authorities of the State of Ohio seized and took this property of their own volition, the defendant was under no obligation to resist it, and if the property was destroyed in that way, without any intervention or invitation of the defendant, the defendant would not be liable. If the property was destroyed by reason of the flood, simply and solely, or the intervention of the military authorities there, this defendant would not be liable for that.

The defendant is only liable in this case for the failure of the Cincinnati, Hamilton & Dayton Railroad to discharge the duties cast upon it my law. It was its duty, of course, to transport this property, if it could do so. It couldn't overcome the flood—it couldn't overcome the action of the military authorities, if the military authorities acted of their own volition, and the only question in

this case is a question of fact and a very simple one, and it is this—whether, from all of this evidence, you believe that this property was taken and seized by the military authorities by and on invitation of the Cincinnati, Hamilton & Dayton Railroad or any of its authorized officers and agents. That is the only question you have to decide in this case.

If it was so taken and destroyed or lost or distributed by the military authorities at the invitation of that railroad, then this defendant would be liable for that. That railroad had no right,
239 had no authority to dispose of that property in this manner. It was its duty to have kept the property as long as it could, and if it could keep it long enough, to have transported it whenever the situation was such that transportation was feasible.

So if you believe from the evidence in this case, all of the evidence in this case, that the military authorities seized this property solely and by reason of the invitation of the Cincinnati, Hamilton & Dayton Railroad Company and disposed of it, and if you further believe from the evidence, had that not been done, this property could have and would have been, in the exercise of ordinary care, shipped to its destination, or any portion of it, then the defendant would be liable for the value of the property, whatever it might be.

Now in determining whether this Railroad Company did invite the destruction of this property, you are to consider all the evidence there is upon that subject. You are the judge of the credibility of all the witnesses who have testified. You are the judges of the weight of the evidence and what it proves on that subject, and you are to consider all of the evidence relative to that question, and determine from that, and if you believe from the evidence that this railroad did invite the destruction of this property and the loss of this property, or seizure of this property so that the plaintiff was deprived of its use, value and benefit, then you will find your verdict accordingly, unless you so believe the defendant is entitled to your verdict.

As I said, it is a simple question of fact—the law upon the subject is elementary, and it is solely a question for you to determine from the evidence.

If you have any suggestions as to the charge, I will entertain them at this time. Of course, I might say that if you find for the plaintiff, you are to determine the value of this property, and the value is to be determined by, the bill of lading says, its invoice price, if there is an invoice price—there is a contract price here and you can determine it from that—the property was worth what it was sold for, if you can find out how much property there was—of course there was some evidence that this property had deteriorated somewhat. Of course the defendant would not be liable for any delay caused by the flood, and any deterioration on account of unavoidable delay in consequence of the flood, the defendant would not be liable for any loss of that sort.

You are to determine from all the evidence, if you reach
240 that point, what this property was worth in its deteriorated condition, if it was deteriorated.

Mr. Gilbert: The Court made use of the word "statute" instead of "Bill of lading."

The Court: Possibly I did use the wrong word.

Mr. Whitnel: I would request the Court to charge the jury that before the defendant would be liable for any statement made by any person to any officer or military power, it must appear from the evidence that the person making such statement was a duly authorized agent of the Cincinnati, Hamilton & Dayton Railroad Company.

The Court: I do so charge the jury—you heard the statement, gentlemen—I charge accordingly—that must appear from the evidence.

Mr. Whitnel: I want to ask the Court to further charge the jury that if they believe from the evidence that the seizure if this poultry by the military authorities was solicited, requested or advised, or in any wise brought about by the representative of the plaintiff, the caretaker in charge of the car, that then in that case, the defendant in this case would not be liable.

The Court: I so charge.

Gentlemen, if you find for the plaintiff, you will say, We, the jury, find the issues for the plaintiff, and assess the plaintiff's damages at, whatever you determine from the evidence in the case, he is entitled to recover; if you find for the defendant, you will say, We, the jury, find the issues for the defendant.

Thereupon the jury retired to consider of their verdict.

And now in furtherance of Justice and that right may be done the defendant, Chicago & Eastern Illinois Railroad Company, tenders and presents the foregoing as its Bill of Exceptions in this case to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the Record, and the same is accordingly done this the 23d day of June, A. D. 1914.

FRANCIS M. WRIGHT, [SEAL.]
*Trial Judge.*

Presented June 23, 1914.
F. M. W.

O. K.
G. GALE GILBERT.

Endorsed: Filed June 23—1914.—C. P. Hitch, Clerk.

241 *Petition.*

Filed July 14, 1914.

And afterwards on to-wit: July 14th, A. D. 1914, there was filed in the office of the clerk of said court a petition for writ of error,

which said petition for writ of error is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
*Seventh Circuit:*

In the United States Circuit Court of Appeals in and for Said Circuit.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

Petition for Writ of Error.

To the Honorable Justices of the United States Circuit Court of Appeals in and for said Circuit:

Your petitioner, The Chicago and Eastern Illinois Railroad Company, a railway corporation organized under the laws of the State of Illinois, by Homer T. Dick, H. L. Browning and L. O. Whitnel its attorneys, respectfully represents unto your honors that on the 8th day of December, A. D. 1913, the defendant in error, The Collins Produce Company, a corporation, commenced an action in case in the Circuit Court of Jefferson County Illinois against it, your petitioner, the plaintiff in error herein, for recovery of Five Thousand ($5,000.00) Dollars as damages alleged by it, the said Collins Produce Company, to have been sustained by reason, as it alleges, of the failure of the petitioner, the defendant named in said suit, as a common carrier to safely deliver to C. E. Barker & Company, for it, The Collins Produce Company, a certain shipment consisting of a certain car of poultry which it, the said Collins Produce Company, alleged it had delivered to this petitioner as such common carrier at
242 the station of Cypress, in the County of Johnson, State of Illinois, to be delivered to said C. E. Barker & Company for the said Collins Produce Company at Newark, in the State of New Jersey. And the said Collins Produce Company, in its said declaration in said suit aforesaid, claims and contends that this petitioner, Chicago & Eastern Illinois Railroad Company, as such Common Carrier, failed to perform its duty as fixed by the statute of the United States, etc.

Your petitioner further shows that upon the commencement of said suit a summons was issued against it, the Chicago and Eastern Illinois Railroad Company, petitioner herein, by the Clerk of the Circuit Court of Jefferson County, Illinois, and served upon it, whereupon it appeared at the January term, A. D. 1914 of said court, held at the City of Mount Vernon, Illinois, and filed in said cause its petition for the removal of said cause to the United States District Court in and for the Eastern District of Illinois upon the ground that said cause of action arose under the constitution and laws of the United States; that said petition for removal was granted by said Circuit Court of Jefferson County, Illinois, whereupon your petitioner ap-

peared at the May Term, A. D. 1914 of the United States District Court in and for the Eastern District of Illinois, held at the City of East St. Louis, Illinois, and filed in said cause its plea of general issue to the declaration of the plaintiff therein, and thereafter, issue being joined on said plea of general issue at said May term, A. D. 1914 of said United States District Court for the Eastern District of Illinois, said cause having come on for trial before the Court, the Honorable Francis M. Wright, Judge Presiding, and a jury, such proceedings were had in said cause before the said Court and jury that the said jury returned a verdict therein against it, the Chicago and Eastern Illinois Railroad Company, this petitioner, and in favor of the said Collins Produce Company for the sum of Four Thousand one hundred and ninety-five and 85/100 Dollars; and thereupon the petitioner herein,—defendant in said cause,—made and filed therein its written motion to set aside said verdict and for new trial therein; but the Court overruled said motion of it, the Chicago and Eastern Illinois Railroad Company, and thereupon the Court entered and rendered judgment on said verdict against the Chicago and Eastern Illinois Railroad Company and in favor of it, the Collins Produce Company, for the sum of Four Thousand one hundred and ninety-five and 85/100 Dollars and costs.

243 And your petitioner further shows that to all of which rulings, proceedings, findings and judgment of said Court in said cause, it, the Chicago and Eastern Illinois Railroad Company, defendant in said cause, at the several times when the same took place, then and there severally excepted and has preserved such exception by a bill thereof signed by the Judge of said Court who tried said cause, under his seal, and duly filed and made a part of the record of said cause.

Your petitioner further represents that it is advised and believes that in the record and proceedings aforesaid in the said United States District Court for the Eastern District of Illinois, there are manifest errors which will more fully appear in the assignment of errors presented herewith and filed with this its petition. And your petitioner for these and other reasons prays that this honorable Court will issue a citation, directed to the District Court of the United States for the Eastern District of Illinois, commanding said Court to send the record and proceedings aforesaid, with all things concerning the same, to this honorable Court at the next term thereof, so that said alleged errors, if any, may be duly corrected by this honorable Court.

And your petitioner further represents that it files herewith an assignment of errors in said cause, and prays this honorable Court for reversal of judgment against it in this cause, and your petitioner will ever pray.

CHICAGO AND EASTERN ILLINOIS RAILROAD, *Petitioner,*
By HOMER T. DICK,
H. L. BROWNING,
L. O. WHITNEL, *Its Attorneys.*

Endorsed: "Filed July 14th, A. D. 1914, G. P. Hitch, Clerk."

And afterwards on the same day, to-wit: July 14th, A. D. 1914, there was filed in the office of the Clerk of said court an assignment of errors in said cause, which said assignment of errors is in the words and figures following, to-wit:

244 Filed July 14, 1914.

UNITED STATES OF AMERICA,
*Seventh Circuit:*

In the United States Circuit Court of Appeals in and for the Seventh Circuit, to the —— Term, A. D. 1914.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

*Assignment of Errors.*

And now comes the Chicago and Eastern Illinois Railroad Company, Plaintiff in Error, by Homer T. Dick, H. L. Browning and L. O. Whitnel, its attorneys, and says that in the record and proceeding in the above entitled cause, and in the verdict of the jury, and in the several rulings, findings and judgment of the District Court of the United States for the Eastern District of Illinois in said cause, there are manifest errors which operated to the prejudice of the rights of the plaintiff in error in said cause in the following respects and particulars, namely:

First. The judgment of the United States District Court for the Eastern District of Illinois in said cause, is not sustained by the evidence in the case in that the evidence as a whole fails to establish the cause of action, if any, alleged and set forth in the declaration of the plaintiff.

Second. The evidence in said cause as a whole and uncontradicted, establishes the contention and plea of the Chicago and Eastern Illinois Railroad Company that the said loss and damage, if any, suffered by the Collins Produce Company, and by it referred to and alleged in its said declaration and sought to be recovered in said cause was wholly occasioned by act of God and in such way and manner as that the Chicago and Eastern Illinois Railroad Company was not and is not legally liable to the Collins Produce Company for or on account of said loss.

245 Third. Said loss and damage, if any, alleged by the Collins Produce Company and sought to be recovered in this action, was occasioned to it, the Collins Produce Company otherwise than as alleged in its, the Collins Produce Company's declaration in said cause, and was caused and occasioned by matters, things and occurrences wholly beyond the control of it, the Chicago and Eastern Illinois Railroad Company or its connecting carrier, to-wit:

by a flood amounting to an act of God and the State Militia of Ohio, and the public authorities of said state acting under and pursuant to martial law emanating from which came the order for the confiscation of the said shipment of poultry and it, the Chicago and Eastern Illinois Railroad Company, says that the whole of the evidence in said record wholly fails to make out a case against it, this plaintiff in error account said loss and damage, if any, to said Collins Produce Company.

Fourth. The Chicago and Eastern Illinois Railroad Company says that the United States District Court erred in said cause in the construction placed by said court upon the act to amend an act entitled An Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission in force July 29, 1906, and especially in the construction placed upon Section 20 of said act; and this plaintiff in error says that the evidence in this case wholly fails to establish a case where in the failure to transport the shipment in question, or the damage thereto or loss thereof was caused by the Cincinnati, Hamilton & Dayton Railway Company, the connecting carrier to which the Chicago and Eastern Illinois Railroad Company delivered said shipment, and that said loss and damage and failure to transport, if any, was not caused by it, said connecting carrier, within the meaning of said statute.

Fifth. The United States District Court erred in admitting in evidence over the objection and exception of plaintiff in error at the trial of said cause, certain papers offered on behalf of the defendant in error among others a statement in writing of defendant in error's claim against plaintiff in error offered for the purpose of proving amount of the loss of defendant in error; and also letter written to defendant in error by consignee of shipment for purpose of proving invoice price, and the United States District Court erred in admitting on behalf of defendant in error, other irrelevant and incompetent evidence.

246 Sixth. That the said United States District Court erred in overruling and denying and in not allowing and sustaining the motion on behalf of the Chicago and Eastern Illinois Railroad Company to direct a verdict in favor of it, the defendant, at the close of the evidence offered for and on behalf of the Collins Produce Company in said cause, and in refusing an instruction in this behalf at said time requested by it, the Chicago and Eastern Illinois Railroad Company.

Seventh. The said United States District Court for the Eastern District of Illinois erred in overruling and denying and in not sustaining and allowing the motion of it, the Chicago and Eastern Illinois Railroad Company, at the close of all the evidence in said cause offered and heard both on behalf of the plaintiff and defendant to direct a verdict in favor of it, the defendant, and in denying and refusing the charge and instruction in that behalf requested by it, the Chicago and Eastern Illinois Railroad Company, at said time.

Eighth. The United States District Court erred in overruling and

denying and in not sustaining and granting the motion for new trial made by plaintiff in error, and in not setting aside the verdict of the jury and awarding to the plaintiff in error a new trial in said cause.

Ninth. The Court erred in rendering judgment on the verdict of the jury in favor of the defendant in error and against the plaintiff in error for the sum of four thousand one hundred ninety five and 85/100 dollars.

By reason whereof the plaintiff in error prays that said judgment of the said District Court of the United States for the Eastern District of Illinois may be reversed and set aside by this Honorable Court.

HOMER T. DICK,
H. L. BROWNING,
L. O. WHITNEL,
*Attorneys for Plaintiff in Error.*

Endorsed: "Filed July 14, 1914, C. P. Hitch, Clerk."

And afterwards on the same day, to-wit: July 14th, A. D. 1914, the following further proceedings were had in said court in said cause and entered of record, to-wit:

247 *Order of July* 14, 1914.

In the District Court of the United States for the Eastern District of Illinois, Tuesday, July 14th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

Now on this 14th day of July, A. D. 1914, comes The Chicago and Eastern Illinois Railroad Company, by its attorneys, Homer T. Dick, H. L. Browning and L. O. Whitnel, and files and presents to the Court its petition praying for the allowance of a writ of error, together with assignment of errors intended to be urged by it, and praying also that a transcript of the record and proceedings upon which the judgment was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and that an order be made fixing the amount of surety which the defendant shall furnish on said writ of error and that the bond so furnished be made a supersedeas bond and that

such other and further proceedings may be had as may be proper in the premises. Upon consideration thereof,

It is Ordered, by the Court that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Seventh Judicial Circuit the judgment herein, upon said plaintiff in error, giving bond according to law in the sum of Ten Thousand ($10,000.00) Dollars, with surety to be approved by the Court.

And afterwards on the same day, to-wit: July 14th, A. D. 1914, there was filed in the office of the Clerk of said Court the defendant's bond on writ of error, which said bond is in the words and figures following, to-wit:

248 *Bond.*

Filed July 14, 1914.

Bond on Writ of Error Returnable to the United States Circuit Court of Appeals for the Seventh Circuit.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

Writ of Error to the United States District Court in and for the Eastern District of Illinois.

Know all men by these presents, that we, the Chicago and Eastern Illinois Railroad Company as principal, and the United States Fidelity and Guaranty Company, a Maryland corporation, of Baltimore City, Maryland, as surety, are held and firmly bound unto the defendant in error, Collins Produce Company, a corporation, in the full and just sum of Ten Thousand ($10,000.00) Dollars to pay to the said defendant in error, Collins Produce Company, its successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 14th day of July, in the year of our Lord one thousand nine hundred and fourteen.

The condition of this obligation is such that whereas lately at a term of the District Court of the United States in and for the Eastern District of Illinois, in a suit pending in said court between Collins Produce Company, a corporation, plaintiff and Chicago and Eastern Illinois Railroad Company, defendant, a judgment was rendered against the Chicago and Eastern Illinois Railroad Company in favor of the Collins Produce Company, plaintiff in said suit, for the sum of Forty one hundred and ninety five and 85/100 dollars and costs of suit, and the said Chicago and Eastern Illinois

Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Collins
249 Produce Company, a corporation, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at the city of Chicago, in said circuit on the 6th day of October next, Now the condition of the above obligation is such that if the said Chicago and Eastern Illinois Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else, to remain in full force and virtue.

In Witness Whereof the said Chicago and Eastern Illinois Railroad Company, principal, has caused its corporate signature and seal to be affixed hereto and the said sureties have hereunto affixed their signatures and seals the day and year hereinabove written.

[SEAL.] CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY,
By W. J. JACKSON, *President.*

O. K.
E. T. D.

Attest:
J. L. FORD, *Secretary.*

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN I. SCULL, [SEAL.]
*Attorney in Fact.* [SEAL.]

STATE OF ILLINOIS,
*County of Cook, ss:*

I, Joseph R. McDonald, a Notary Public in and for the county and state aforesaid, do hereby certify that John I. Scull, attorney in fact of the United States Fidelity and Guaranty Company, who is personally known to me to be the same person whose name is subscribed in the foregoing instrument, as such Attorney in fact, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, and as the free and voluntary act of the said United States Fidelity and Guaranty Company for the uses and purposes therein set forth, and caused the corporate seal of said company to be thereto attached.

250 Given under my hand and Notarial seal this 14th day of July, A. D. 1914.

[N. P. SEAL.] JOSEPH R. McDONALD,
*Notary Public.*

My commission will expire November 27th, 1916.

Endorsed: "Filed July 14, 1914. C. P. Hitch, Clerk."

*Order of July* 14, 1914.

And afterwards on the same day, to-wit: July 14th, A. D. 1914, the following further proceedings were had in said court in said cause and entered of record, to-wit:—

In the District Court of the United States for the Eastern District of Illinois, Tuesday, July 14th, A. D. 1914.

Present: Honorable Francis M. Wright, Judge.

Case.

No. 915.

COLLINS PRODUCE COMPANY, Plaintiff,

vs.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Defendant.

On this 14th day of July, A. D. 1914, comes again the defendant, The Chicago and Eastern Illinois Railroad Company, by its attorneys, Homer T. Dick, H. L. Browning and L. O. Whitnel, and presents to the Court its bond on writ of error in this cause, conditioned according to law in the sum of Ten Thousand ($10,000.00) Dollars, with United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety thereon. And the Court having examined said bond and being fully advised as to the surety.

It is ordered by the Court that the said bond be and the same is hereby approved. It is further ordered that said bond shall operate as a supersedeas in this case.

251 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Collins Produce Company, plaintiff and The Chicago and Eastern Illinois Railroad Company, Defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14th day of July, in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.] C. P. HITCH,
*Clerk of the District Court of the United States for the Eastern Dist. of Illinois.*

Allowed by

FRANCIS M. WRIGHT, *Judge.*

252 EASTERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 7th day of August A. D. 1914.

C. P. HITCH,
*Clerk United States District Court, Eastern District of Illinois.*

(Endorsed:) #915. United States District Court of Appeals, Seventh Circuit. Chicago and Eastern Illinois Railroad Company, Plaintiff in Error, vs. Collins Produce Company, Defendant in Error. Writ of Error. Copy deposited for the defendant in error in the Clerk's Office, U. S. Dist. Court, Eastern District of Illinois.

And afterwards on the same day, to-wit: July 31st, A. D. 1914, there was filed in the office of the Clerk of said Court the defendant's præcipe for transcript on writ of error, which said præcipe is in the words and figures following, to-wit:

253 *Præcipe for Record.*

Filed July 31, 1914.

UNITED STATES OF AMERICA,
*State of Illinois:*

In the District Court of the United States for the Eastern District of Illinois.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

The Clerk of the United States District Court in and for the Eastern District of Illinois will please make a transcript of the record in the above entitled cause and transmit the same to the clerk of the United States Circuit Court of Appeals in and for the Seventh Circuit, Federal Building, Chicago, Illinois, said record to contain:

First. Transcript of record and proceedings in State Court on removal to United States District Court.

Second. Declaration in said cause filed by defendant in error as plaintiff in said suit.

Third. Plea, general issue and special pleas filed by the plaintiff in error as defendant, to the said declaration.

Fourth. All pleadings filed in said cause in the order filed by said parties.

Fifth. All orders made by the court touching the pleadings of said parties so filed in said cause.

Sixth. All orders and judgments of the court in said cause made and rendered.

Seventh. Bill of Exceptions.

Eighth. Petition for writ of error and assignments of error.

Ninth. Order of court granting writ of error.

Tenth. Bond filed by plaintiff in error and order of court approving same and making same a supersedeas.

Eleventh. Certificate of Clerk to said record.

Twelfth. Said transcript of record to contain all pleadings, orders, bill of exceptions, petitions, assignments of error necessary to
254 make record, and all other documents contained in said record necessary to complete the same pursuant to the requirements of rules of the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

HOMER T. DICK,
H. L. BROWNING,
L. O. WHITNEL,
*Attorneys for Plaintiff in Error.*

Endorsed: "Filed July 31st, A. D. 1914, C. P. Hitch, Clerk."

*Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Eastern District of Illinois, ss:*

I, C. P. Hitch, Clerk of the District Court of the United States for the Eastern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court and made in accordance with præcipe filed in the cause entitled Collins Produce Company vs. Chicago and Eastern Illinois Railroad Company, General Number 915, as the same appears from the original records and files in said court now remaining in my custody and control. I further certify that the writ of error and citation with endorsements thereon are the original writ of error and citation with endorsements in said cause.

Witness my hand and official seal at my office in the City of Danville, in said District this 7th day of August, A. D. 1914.

[SEAL.] C. P. HITCH, *Clerk.*

255 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Collins Produce Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to Writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Illinois, wherein The Chicago and Eastern Illinois Railroad Company is Plaintiff in Error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Francis M. Wright, Judge of the District Court of the United States for the Eastern District of Illinois this 14th day of July, in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.] FRANCIS M. WRIGHT, *Judge.*

On this 25th day of July, in the year of our Lord one thousand nine hundred and fourteen, personally appeared H. L. Browning before me, the subscriber and makes oath that he delivered a true copy of the within citation to J. Cyril Begg Vice President of Collins Produce Company, defendant in error the President or other superior officer of said Company not found in said district on July 25/14.

H. L. BROWNING.

Sworn to and subscribed the 25th day of July A. D. 1914.

[SEAL.] IRENE BACON,
*Notary Public.*

(Endorsed:) Gen. No. 915. District Court of the United States, Eastern District of Illinois. Chicago and Eastern Illinois Railroad Company, Plaintiff in Error, vs. Collins Produce Company, Defendant in Error. Citation. Filed July 28, 1914. C. P. Hitch, Clerk.

256 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 255, inclusive, contain a true copy of the printed record, printed under my supervision, and filed August 27, 1914, on which this cause was argued, heard and determined in the case of The Chicago and Eastern Illinois Railroad Company vs. Collins Produce Company No. 2155, October Term, 1913, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this ninth day of February A. D. 1917.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

257 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held at the United States Court-room, in the City of Chicago, in said Seventh Circuit on the Seventh Day of October, 1913, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Thirteen and of Our Independence the One Hundred and Thirty-eighth Year.

And afterwards, to-wit: on the fourteenth day of August, 1914, in the October term last aforesaid, came the plaintiff in error, by its counsel, Mr. L. O. Whitnel, and filed in the office of the Clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1914.

No. 2155.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

The Clerk will enter my appearance as counsel for the plaintiff in error.

L. O. WHITNEL,
*Cahokia Building, East St. Louis, Illinois.*

Endorsed: Filed Aug. 14, 1914. Edward M. Holloway, Clerk.

And afterwards, to-wit: on the first day of September, 1914, in the October term last aforesaid, came the defendant in error, by its counsel, Mr. G. Gale Gilbert, and filed in the office of the Clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:

258 United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1913.

No. 2155.

THE CHICAGO AND EASTERN ILLINOIS RY. CO., Plaintiff in Error,

vs.

COLLINS PRODUCE CO., Defendant in Error.

The Clerk will enter my appearance as counsel for the defendant in error.

G. GALE GILBERT,
*Mt. Vernon, Illinois.*

Endorsed: Filed Sept. 1, 1914. Edward M. Holloway, Clerk.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court-room, in the City of Chicago, in said Seventh Circuit on the Sixth Day of October, 1914, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Fourteen, and of Our Independence the One Hundred and Thirty-ninth Year.

And afterwards, to-wit: On the sixth day of October, 1914, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 6, 1914.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

259 2155.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

vs.

COLLINS PRODUCE COMPANY.

Error to the District Court of the United States for the Eastern District of Illinois.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on November 25, 1914.

And afterwards, to-wit: On the twenty-fifth day of November, 1914, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 25, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

2155.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

vs.

COLLINS PRODUCE COMPANY.

Error to the District Court of the United States for the Eastern District of Illinois.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel,

and on oral argument by Mr. L. O. Whitnel and Mr. Homer T. Dick, counsel for plaintiff in error, and by Mr. G. Gale Gilbert, counsel for defendant in error, and the Court having heard the same takes this matter under advisement.

260 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court-room, in the City of Chicago, in said Seventh Circuit, on the Fifth Day of October, 1915, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Fifteen, and of Our Independence the One Hundred and Fortieth Year.

And afterwards, to-wit: On the twenty-second day of May, 1916, in the October term last aforesaid, came the plaintiff in error, by its counsel, Mr. Homer T. Dick, and filed in the office of the Clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:

Chicago and Eastern Illinois Railroad,
Law Department,
724 McCormick Building.

Homer T. Dick, General Solicitor.

CHICAGO, ILL.,

May 20, 1916.

Mr. Edward M. Holloway, Clerk United States Circuit Court of Appeals, Federal Bldg., Chicago.

DEAR SIR: In your cause No. 2155, C. & E. I. R. R. Co. vs. Collins Produce Company, Mr. Gilbert of Mt. Vernon, Illinois, Attorney for the defendant in error, and Mr. L. O. Whitnel of East St. Louis, Illinois, who is associated with me as Attorney for plaintiff in error, have written me concerning notice mailed to them by you that this case will be reset for argument on Tuesday, May 23rd, 1916 at 10:00 A. M. on account of the illness of Hon. Francis E. Baker.

I received no notice of this, and have not been receiving
261 notices in the case heretofore.

Will you kindly have my name shown in the record as Attorney for the plaintiff in error in addition to the name of Mr. L. O. Whitnel of East St. Louis?

I will be present next Tuesday, May 23rd, when the case is assigned for re-argument. Mr. Gilbert has written me asking that I represent him also on that occasion.

Yours truly,

HOMER T. DICK,
*General Solicitor.*

H. T. D. G. R.

Endorsed: Filed May 22, 1916. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twenty-third day of May, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, May 23, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

262 Before Hon. Christian C. Kohlsaat, Circuit Judge; Hon. Julian W. Mack, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2155.

THE CHICAGO & EASTERN ILLINOIS RAILROAD CO.

vs.

COLLINS PRODUCE COMPANY.

Error to the District Court of the United States for the Eastern District of Illinois.

It is ordered by the Court that this cause be re-argued and set down for hearing on June 5, 1916.

And afterwards, to-wit: On the fifth day of June, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Monday, June 5, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Christian C. Kohlsaat, Circuit Judge, presiding.
Hon. Julian W. Mack, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before Hon. Julian W. Mack, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

263 2155.

THE CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

vs.

COLLINS PRODUCE COMPANY.

Error to the District Court of the United States for the Eastern District of Illinois.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. L. O. Whitnel, counsel for plaintiff in error, and by Mr. G. Gale Gilbert, counsel for defendant in error, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-fifth day of July, 1916, in the October term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court, which Opinion is in the words and figures following, to-wit:

264 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1915, April Session, 1916.

No. 2155.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Illinois.

Before Mack, Alschuler, and Evans, Circuit Judges.

The Collins Produce Co., defendant in error, herein called plaintiff, brought suit against the Chicago and Eastern Illinois Railroad Co., plaintiff in error, herein called defendant, for damages occasioned by the loss of a car of chickens. Verdict and judgment for plaintiff for $4,125.82.

Plaintiff shipped a car of chickens from Cypress, Ill., for Newark, N. J., taking defendant's bill of lading therefor. The shipment left Cypress March 21st over defendant's line and was conveyed to Cincinnati where it was delivered to a connecting carrier, the Cincinnati,

Hamilton & Dayton R. R. Co. for forward movement to its destination.

The car duly reached Dayton, Ohio March 25th where it met "the Dayton flood," which was so unusual and extraordinary as concededly to come within the legal definition of "an act of God." The car was surrounded by water, but on comparatively high land, and no damage occurred to the poultry. In fact the water at this place scarcely rose above the tracks.

The general situation in Dayton, occasioned by the rise of water, was such as to call for official action on the part of the Governor of Ohio, who ordered the militia to Dayton and proclaimed martial law. General Wood was placed in command.

265 The car of poultry was at all times in the charge of plaintiff's caretaker whose duty it was to feed and water and look after the poultry en route. He continued his duties while the car was at Dayton, and claims that he had no difficulty in securing the necessary feed. At Dayton the caretaker employed an assistant and made arrangements to unload the poultry in a yard provided for that purpose, if the situation required it.

The car of chickens was confiscated on March 31st on the order of General Wood and by his authority removed and disposed of, all against the protest of the caretaker.

Plaintiff contended that the confiscation was unwarranted and was made at the request of defendant. This contention, defendant disputed.

The court submitted the case to the jury upon one theory, viz: that the defendant was liable if the car was seized by the military authorities on the invitation of the carrier or any of its authorized officers and agents. All other controlling issues were resolved by the District Court in favor of the carrier.

The court presented the particular issue to the jury in the following language:

"The defendant is only liable in this case for the failure of the C. H. & D. R. R. to discharge the duties cast upon it by law. It was its duty, of course, to transport this property, if it could do so. It couldn't overcome the flood—it couldn't overcome the action of the military authorities, if the military authorities acted of their own volition, and the only question in this case is a question of fact and a very simple one, and it is this—whether, from all of this evidence, you believe that this property was taken and seized by the military authorities by and on invitation of the Cincinnati, Hamilton & Dayton Railroad or any of its authorized officers and agents. That is the only question you have to decide in this case."

The defendant at the close of the trial moved the court to direct the jury to render a verdict in its favor, which motion was denied. Errors complained of are: (*a*) Erroneous construction of the Carmack amendment to the Interstate Commerce law. (*b*) The admission and rejection of evidence. (*c*) Refusal to direct a verdict in favor of the defendant.

266 EVANS, *Circuit Judge,* delivered the opinion of the court.

It is contended for defendant that the liability of the initial carrier for loss occurring while the shipment is in the charge of the connecting carrier is not the same as the liability of the initial carrier for loss while the shipment is in its charge and is not the common law liability of a carrier. In support thereof, counsel refers to that portion of Section 20 of the Act to Regulate Commerce, commonly called the Carmack Amendment, which reads as follows:

"Any common carrier * * * shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose lines such property may pass."

Defendant's position is that the words "caused by it" appearing in the quotation impose upon the shipper the burden of establishing that the loss was in fact caused by the carrier, and reliance is placed upon the case of Adams Express Co. v. Kroninger, 226 U. S. 491. The United States Supreme Court, in the case of Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Rankin, decided May 22, 1916, after referring to the case of Adams Express Co. v. Kroninger, passing upon the words "caused by it," as they appear in Section 20 of the Interstate Commerce Act, says,

"Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common law doctrine heretofore approved by us in respect to the carrier's liability for loss occurring on its own line."

The trial court properly concluded that the Carmack Amendment to the 20th Section of the Act to Regulate Commerce did not change the common law rule or restrict the liability of the carrier. The amendment merely imposed a liability upon the initial carrier for a loss occurring on the line of a connecting carrier. It was not intended to restrict, nor did it limit the liability of any carrier. Atlantic Coast Line Co. v. Riverside Mills, 219 U. S. 194, 205; Gal. H. & S. Ry. Co. v. Wallace, 223 U. S. 492. Also see decisions of United States Supreme Court Advance Sheets: New York, P. & N. Ry. Co. v. Peninsula Produce Exchange Co. decided Jan. 24, 1916; Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Rankin, decided May 22, 1916; N. P. Ry. Co. v. Wall, decided April 24, 1916.

267 Defendant maintains that (*a*) Invitation by the carrier to the military authorities to seize the car did not constitute "loss, damage or injury to such property caused by it or by any common carrier." (*b*) The seizure and confiscation of the car of chickens was by military authority over which the common carrier had no control, and that liability for loss by reason thereof was not imposed by the bill of lading or by the common law.

The first contention of defendant is based upon an erroneous construction of the Carmack Amendment to the Interstate Commerce Act as heretofore pointed out. The loss being established, the liability of the initial carrier was not dependent upon the plaintiff's proof that such loss was caused by either the initial or connecting

carrier. Defendant's liability was the common law liability of a carrier, and it was not incumbent upon plaintiff to show that an act of the carrier occasioned the loss. Galveston, H. & S. Ry. Co. v. Wallace, 223 U. S. 491.

The claim of non-liability for seizure of the car of chickens, as an act over which defendant had no control, presents a more serious question.

It appears from the bill of lading that the carrier's liability was restricted by the following express language:

"No carrier nor party in possession of any of the property herein described shall be liable for any loss thereof or any damage thereto or delay caused by the act of God, the public enemy, quarantine, authority of law, or the act or default of the shipper or owner."

We find few precedents to guide us in a case like this one.

It is obvious, however, that the mere declaration of martial law would not relieve a common carrier, operating in the district thus covered, of all liability to the shipper. I. C. R. R. Co. v. McClellan, 54 Ill. 71.

The trial court accepted the view most favorable to the defendant and concluded that martial law in its fullest sense was in fact declared, that the Governor of the State had full authority so to do and that he exercised his power in the case, and was amply justified in exercising such power, and that General Wood in charge of the military forces acted within the power delegated to him by the Governor.

Accepting this view, the district court concluded to rest the carrier's liability merely upon the action of the railroad officials leading up to the confiscation of the car of chickens. In view of
268 this court's conclusion on this phase of the question and the law applicable thereto, it is not necessary to consider the effect, generally, upon a carrier's liability, of the declaration of martial law under the circumstances here disclosed.

While the testimony on this issue was controverted, the district court was amply justified in submitting to the jury the question of whether the property was taken and seized by the military authorities by and upon the invitation of the carrier, provided the determination of this issue imposed a liability on the carrier.

Colonel Vollrath, one of General Wood's aids, testified that he received a postal card from an official of the C. H. & D. R. R. Co. calling his attention to this car of poultry and urging that attention be given to it. A few days later he received a telephonic communication calling his attention to the car of chickens, urging him to take possession of it, and he stated such request was made either by the superintendent or assistant superintendent of the road. Assistant Adjutant General Clark testified that he received a similar telephone call from one claiming to be the freight agent of the C. H. & D. R. R., and that it seemed best to dispose of the contents of the car, and that "he thought it was best that the military authorities take over those chickens and distribute them."

General Wood stated that if it had not been for this report, con-

firmed by the statement of the railroad company, he would not have ordered the carload of poultry confiscated. It further appears from the caretaker's testimony that the chickens were in good condition, and that he had sufficient food on hand or available. The superintendent of the C. H. & D. R. R. admitted that he went to see the caretaker and advised him that rather "than let any poultry die it would be advisable to turn them over to the authorities together with his invoice."

Notwithstanding the superintendent and assistant superintendent denied having sent the postal card and denied having held any telephonic communication with the military authorities, we conclude, that, upon this state of the evidence, the court properly concluded that this issue of fact could not be taken from the jury.

Nor did the court err in concluding that these facts, if found in favor of the shipper, imposed a liability upon the carrier.

If the military authorities took the car at the request of
269 the carrier, and would not have done so but for such request, can it be said that the loss was caused by "the act of God" or "the authority of law?" We think not. Under these circumstances the car was not taken by the military authorities under and by virtue of the martial law declared in the city. If it were a fact that the car was taken at the request of the carrier it was not such confiscation by military authorities as to enable the carrier to escape liability.

Even though the rainfall was so extraordinary as to constitute "an act of God," the carrier was not relieved from all liability to the shipper. It still owed the shipper the duty of exercising reasonable diligence in endeavoring to save the shipment or prevent further loss. McNeil Higgins Co. v. Old Dominion Steamship Co. decided by this court at this session.

The burden of proving that the loss resulted from some cause for which the carrier was not responsible in law or by contract is upon the defendant. Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace 223 U. S. 481, 492. It became, therefore, incumbent upon the defendant to show that the loss was due solely to some one or more of the causes which by law exempted it from liability.

If the loss be occasioned by a commingling of the "act of God" and the negligence of the carrier, the latter is not relieved from liability. Wolf v. American Express Co. 43 Mo. 421; Wald v. Pittsburgh, C. C. & St. L. R. R. 162 Ill. 545. For the same reason we conclude that the exception represented by the words "authority of law" as they appear in the bill of lading relieves the carrier from liability only when such cause is free from any act of the carrier contributing to the loss. 4 Ruling Case Law Sec. 199; B. & O. R. R. v. O'Donnell 49 Ohio State 489; I. C. R. R. Co. v. McClellan 54 Ill. 71.

The rule seems to be well stated in 4 Ruling Case Law Sec. 199 as follows:

"Since a carrier is bound, both by duty and necessity, to respect and yield to the paramount public authority in power at the place

where his undertaking is to be performed, it has been held, that if the process is not void on its face, he will be protected even though the statute under which the property is seized is unconstitutional. * * * Moreover in order that the act of public authority may be a protection in such cases it is necessary that the seizure be made without the procurement or connivance of the carrier."

270 The district court therefore did not err in refusing to direct the verdict for the defendant.

Defendant further complains because of the admission of incompetent and hearsay evidence and because the evidence received did not establish the authority of or the agency of the parties whose statements were so received in evidence.

The objection that the evidence was incompetent and mere hearsay is untenable for the reason that the defendant read in evidence the depositions containing the statements now complained of. The testimony of the witnesses, whose evidence is now objected to, was taken by deposition at the request of the plaintiff. On the trial these depositions were read in evidence by defendant. It follows that defendant is in no position to complain.

Objection is also made because the testimony failed to show that the statements were made by any one authorized to speak for the defendant. The difficulty with this objection is that the testimony complained of was received without objection. Witnesses stated that either the superintendent or the assistant superintendent made the request of General Wood that the car of chickens be confiscated. If the party who thus made the request was either the superintendent or the assistant superintendent of the division there can be no question but that agency as well as authority was inferable.

Complaint is also made because the court admitted in evidence a claim presented to the defendant by the plaintiff, and which contained a statement of the number of pounds of poultry as well as the price at which the poultry was to be sold at Newark, N. J. The evidence was properly received, not to establish price, but to show the plaintiff presented its claim to the carrier prior to the commencement of the action, and pursuant to the provisions of the bill of lading. It was not offered or received for any other purpose and value was established by other testimony.

The judgment is therefore

Affirmed.

A true Copy.

Teste:

____ ____,

*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

271 And afterwards, on the same day, to-wit: On the twenty-fifth day of July, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, July 25, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before: Hon. Julian W. Mack, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2155.

THE CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

vs.

COLLINS PRODUCE COMPANY.

Error to the District Court of the United States for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

272 And afterwards, to-wit: On the twenty-second day of August, 1916, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Rehearing, which said Petition for Rehearing is not copied here nor made a part of this record.

And afterwards, on the same day, to-wit: On the twenty-second day of August, 1916, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Proof of Service of Petition for Rehearing, which said Proof of Service is not copied here nor made a part of this record.

And afterwards, to-wit: On the fifth day of September, 1916, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Answer to Petition for Rehearing, which said Answer is not copied here nor made a part of this record.

And afterwards, to-wit: On the twenty-seventh day of September, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Wednesday, September 27, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Julian W. Mack, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

273 2155.

THE CHICAGO & EASTERN ILLINOIS RAILROAD CO.

vs.

COLLINS PRODUCE CO.

Error to the District Court of the United States for the Eastern District of Illinois.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court-room, in the City of Chicago, in said Seventh Circuit, on the Third Day of October, 1916, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Sixteen, and of Our Independence the One Hundred and Forty-first Year.

And afterwards, to-wit: On the twenty-seventh day of January, 1917, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Writ of Error, which said Petition for Writ of Error is in the words and figures following, to-wit:

*Petition for Writ of Error from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Seventh Circuit.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Seventh Circuit.

274 THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

Petition for Writ of Error.

Your petitioner, The Chicago and Eastern Illinois Railroad Company, the plaintiff in error, in the above entitled cause, respectfully

shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Seventh Circuit and that a judgment has therein been rendered on the 25th day of July, A. D. 1916 affirming a judgment of the District Court of the United States in and for the Eastern District of Illinois, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was depending in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon a writ of error; and therefore your petitioner, The Chicago and Eastern Illinois Railroad Company, Plaintiff in Error, respectfully prays that a writ of error be allowed it in the above entitled cause directed to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the
275 assignment of errors herewith filed by said Plaintiff in Error, may be reviewed and if error be found, corrected according to the laws and customs of the United States.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Plaintiff in Error,*

By HOMER T. DICK,
LINDORF O. WHITNEL,
*Its Attorneys.*

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of One Thousand Dollars.

SAMUEL ALSCHULER,
*United States Circuit Judge.*

Endorsed: Filed Jan. 27, 1917. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twenty-seventh day of January, 1917, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which said Assignment of Errors is in the words and figures following, to-wit:

THE UNITED STATES OF AMERICA:

The United States Circuit Court of Appeals, Seventh Circuit.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

*Assignment of Errors.*

And now comes the plaintiff in error, The Chicago and
276 Eastern Illinois Railroad Company, by Homer T. Dick and Lindorf O. Whitnel, its attorneys, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Seventh Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said The Chicago and Eastern Illinois Railroad Company, Plaintiff in Error, in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the United States District Court in and for the Eastern District of Illinois for forty one hundred twenty-five dollars and eighty-two cents ($4,125.82) and costs of suit entered on July 25th, 1916, in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the judgment of the United States District Court for the Eastern District of Illinois in said cause, and in not remanding said cause to said United States District Court for a new trial.

Third. The United States Circuit Court of Appeals for Seventh Circuit erred in said cause in the construction placed upon Section Twenty (20) of the Act to Regulate Commerce, and in refusing to hold that the proper construction of said section placed the burden on defendant in error of establishing that the connecting carrier caused the loss and damage sued for and sought to be recovered in said cause.

Fourth. The United States Circuit Court of Appeals erred in holding that "The trial court properly concluded that the Carmack Amendment to the 20th Section of the Act to Regulate Commerce did not change the common law rule or restrict the liability of the Carrier" in a case where the initial carrier is sued for a loss which accrued on a connecting carrier's line.

277 Fifth. The Circuit Court of Appeals erred in holding that where the freight was seized and confiscated by the military authority acting under martial law while such freight was in possession of connecting carrier and the loss so occasioned to the shipper, that liability of the initial carrier did not depend upon defendant in error making proof that connecting carrier caused the loss.

Sixth. The Circuit Court of Appeals erred in holding that where

by an act of God,—an unprecedented flood—a condition is produced which renders a connecting carrier unable to transport freight then in transit, and when so situated martial law is declared and military district or zone established in which is situated the freight, and thereupon the militia, acting under orders of commander, seizes and confiscates the shipment, after having assumed martial authority over the lines and property of the carrier in the military district or zone, that the initial carrier is liable upon the grounds or for the reason that one who was an agent of connecting carrier at the time martial law was declared recommended that military authority use the freight to relieve flood sufferers; and in holding that under such conditions the initial carrier is bound by such act of such agent of connecting carrier; and in holding such evidence proper to be considered as influencing military action.

Seventh. The Circuit Court of Appeals erred in holding that record contains competent, admissible evidence establishing agency between connecting carrier and the person or persons who communicated with military officers by telephone and who wrote the postal card to commander in charge of militia.

Eighth. The Circuit Court of Appeals erred in holding that District Court did not commit error in refusing to direct verdict in
278 favor of plaintiff in error.

Ninth. The Circuit Court of Appeals erred in not sustaining the second, third, fourth, fifth, sixth and seventh assignments of error upon the record in said cause.

Wherefore, the said The Chicago and Eastern Illinois Railroad Company, plaintiff in error, prays that for the errors aforesaid, and other errors appearing in the record of said United States Circuit Court of Appeals, in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the United States District Court for the Eastern District of Illinois, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this honorable Court, to the end that justice may be done in the premises.

HOMER T. DICK,
LINDORF O. WHITNEL,
*Attorneys for Plaintiff in Error.*

Endorsed: Filed Jan. 27, 1917. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twenty-seventh day of January, 1917, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Bond on Writ of Error, which said Bond is in the words and figures following to-wit:

279 UNITED STATES OF AMERICA:

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, Plaintiff in Error,

vs.

COLLINS PRODUCE COMPANY, Defendant in Error.

Error to the United States Circuit Court of Appeals for the Seventh Circuit.

*Bond on Writ of Error from the Supreme Court to the United States Circuit Court of Appeals for Seventh Circuit.*

Know all men by these presents, that we, The Chicago and Eastern Illinois Railroad Company as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Collins Produce Company in the full and just sum of one thousand ($1,000) Dollars to be paid to the said Collins Produce Company, its certain attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals and dated this 27 day of January, A. D. 1917, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Seventh Circuit in a suit depending in said court between The Chicago and Eastern Illinois Railroad Company, Plaintiff in Error, and Collins Produce Company, Defendant in Error, a judgment was rendered against the said The Chicago and Eastern Illinois Railroad Company, and the said The Chicago and
280 Eastern Illinois Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Collins Produce Company citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington within thirty days hereof.

Now, the condition of the above obligation is such, that if the said The Chicago and Eastern Illinois Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it

fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, [SEAL.]
By W. J. JACKSON, *Its President.*

O. K.
H. T. D.

UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By HENRY M. MARSHALL, *Attorney in Fact,*
By KENNETH H. WOOD, *Attorney in Fact.* [SEAL.]

Attest:
H. J. CRONIN, *Secretary.*

Sealed and delivered in the presence of:
——— ———.
——— ———.

Approved by
SAMUEL ALSCHULER,
*United States Circuit Judge.*

Endorsed: Filed Jan. 27, 1917. Edward M. Holloway, Clerk.

281 And afterwards, on the same day, to-wit: On the twenty-seventh day of January, 1917, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Saturday, January 27, 1917.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before Hon. Samuel Alschuler, Circuit Judge.

2155.

THE CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY
vs.
COLLINS PRODUCE COMPANY.

Error to the District Court of the United States for the Eastern District of Illinois.

On application of counsel for plaintiff in error, it is now here ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this Court.

2155.

THE CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

vs.

COLLINS PRODUCE COMPANY.

Error to the District Court of the United States for the Eastern District of Illinois.

Now this day comes the plaintiff in error, by its counsel, Mr. L. O. Whitnel and Mr. Homer T. Dick, and presents a petition for a writ of error to remove this cause to the Supreme Court of the
282 United States, together with an assignment of errors, and on consideration whereof, it is now here ordered that the said petition be, and the same is hereby granted and that a writ of error issue as prayed for, upon the filing of a bond conditioned according to law in the sum of one thousand dollars; and counsel for plaintiff in error now presents a bond in the sum of one thousand dollars ($1,000.00) and the said bond is hereby approved.

283 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 26, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel, the Petition for a Rehearing and Proof of Service of same, and the Answer to the Petition for Rehearing) in the case of The Chicago and Eastern Illinois Railroad Company vs. Collins Produce Company, No. 2155, October Term, 1913, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this ninth day of February, A. D. 1917.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

284 UNITED STATES OF AMERICA:

Supreme Court of the United States of America.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Circuit Court of Appeals be-

fore you, or some of you, between The Chicago and Eastern Illinois Railroad Company, Plaintiff in Error, and Collins Produce Company, Defendant in Error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 27th day of January, in the year of our Lord, one thousand nine hundred and seventeen.

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of Appeals, 7th Circuit.*

Allowed by:
SAMUEL ALSCHULER,
*United States Circuit Judge.*

Filed Feb. 8, 1917. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals, Seventh Judicial Circuit, *ss:*

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause this ninth day of February, A. D. 1917.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

285 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Collins Produce Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Seventh Circuit, wherein The Chicago and Eastern Illinois

Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Alschuler, United States Circuit Judge, this 27 day of January, in the year of our Lord one thousand nine hundred and seventeen.

SAMUEL ALSCHULER,
*U. S. Circuit Judge, 7th Judicial Circuit.*

Copy of writ served on us this the 29th day of January, A. D. 1917.

G. GALE GILBERT,
*Attorney for Defendant in Error.*

Filed Feb. 8, 1917. Edward M. Holloway, Clerk.

Endorsed on cover: File No. 25,779. U. S. Circuit Court Appeals, 7th Circuit. Term No. 949. The Chicago and Eastern Illinois Railroad Company, plaintiff in error, vs. Collins Produce Company. Filed February 19th, 1917. File No. 25,779.

Office Supreme Court, U. S.
FILED
OCT 6 1917
JAMES D. MAHER
CLERK

- 12 -

No. [redacted] 138

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,
*Plaintiff in Error,*
vs.
COLLINS PRODUCE COMPANY,
*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

## STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

HOMER T. DICK,
LINDORF O. WHITNEL,
COUNSEL FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

No. 949.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,
*Plaintiff in Error,*
vs.
COLLINS PRODUCE COMPANY,
*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

## STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

## STATEMENT OF PLAINTIFF IN ERROR.

I.

This suit was instituted by Collins Produce Company, defendant in error, a shipper, against Chicago and Eastern Illinois Railroad Company, plaintiff in error, the initial carrier, to recover for the loss of a carload of poultry alleged to have been lost while in the possession of the Cincinnati, Hamilton and Dayton Railroad, a connecting carrier.

The suit was commenced in the State Court and removed to the United States District Court for the Eastern District of Illinois.

The declaration of the defendant in error (pp. 5 and 6, printed record) consists of one count, and the alleged right of action is based upon the provision of the 20th section of "An Act to Amend an Act entitled An Act to regulate commerce, approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," and particularly the 20th section, which is set forth in said declaration as follows:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any carrier, railroad or transportation company to which such property may pass; and no contract, receipt, rule or regulation shall exempt such carrier, railroad or transportation company from the liability hereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

After setting forth the statute, it is alleged that defendant in error, on the 21st day of March, 1913, delivered to the plaintiff in error at Cypress, Illinois, a station on its line, for shipment, a carload

of poultry to be transported to Newark, in the State of New Jersey; that the defendant in error issued a receipt or bill of lading for the said poultry; that defendant in error paid the freight charges for such transportation of said shipment, and that defendant in error is the lawful holder of the said receipt or bill of lading, and that plaintiff in error failed to make delivery of said shipment, whereby same was wholly lost to the defendant in error, to the damage and injury of defendant in error in the sum of five thousand dollars.

To this declaration the plaintiff in error filed the plea of non assumpsit, and in addition, six *special* pleas. (Pp. 24 to 29, Printed Record.) Later the special pleas were withdrawn and stipulation filed (p. 30, Printed Record), whereby it is stipulated that all matters proper to be proven under special pleas shall be admitted under the general issue.

The defenses interposed are (a) that the loss and damage was occasioned by an act of God; (b) that the shipment was under and pursuant to martial law seized and confiscated by the militia for the benefit of flood sufferers; (c) that carrier was prevented by devastating flood due to act of God, from forwarding shipment and that while said shipment was so situated, martial law was declared and the civil government superseded thereby and the connecting carrier and its agents and servants there subjected to same, and the shipment, by the militia acting under martial law, confiscated; (d) that while said shipment was enroute and being transported an unprecedented flood occurred which washed away and destroyed the tracks, embankments and bridges of the connecting carrier and other carriers at Dayton,

Ohio, thereby making it impossible for carrier to forward said shipment and that martial law was declared and at said place the civil was superseded by the military authority, and the military government there took possession and control of the railways in said zone and of all shipments of freight there situate, including the shipment in question; that while said shipment was so situate at the suggestion, instance and request of the agent of the defendant in error, and after investigation made, the military authority, acting pursuant to orders issued by commander, confiscated said shipment for the use of flood sufferers; (e) that the loss of said shipment was not caused by it, the plaintiff in error, or by the C. H. & D. Railroad Company, the connecting carrier.

The plaintiff in error operates a line of railroad through the State of Illinois. Among other stations on said line are the stations of Cypress, Mt. Vernon and Salem. Salem is north of Cypress 92 miles, and Mt. Vernon is intermediate 70 miles north of Cypress. At Salem the B. & O. S. W. Railway crosses and connects with the road of plaintiff in error. The B. & O. S. W. Ry. connects with the C. H. & D. R. R. at Cincinnati, Ohio, 268 miles east of Salem. On the B. & O. S. W. Railway, between Salem and Cincinnati is located the City of Vincennes, Indiana.

On March 21, 1913, the defendant in error delivered to plaintiff in error a shipment of poultry, car partially loaded, and arranged whereby additional poultry was to be loaded at Mt. Vernon, Illinois, and also at Vincennes, Indiana, and car transported to Newark, N. J. (bill of lading appears Printed

Record, pp. 38 to 42, incl.), the car consigned to C. E. Barker & Co. and routed C. & E. I. and B. & O. On March 21st the car moved from Cypress to Mt. Vernon, and thence to Salem, over line of plaintiff in error. At Salem car was delivered to B. & O. S. W. and by that carrier transported to Vincennes, where loading was completed and car forwarded by B. & O. S. W. to Cincinnati, Ohio, and there delivered to Cincinnati, Hamilton and Dayton Railroad for forward movement enroute to destination.

The movement of this shipment was regular and without delay until the morning of March 25, 1913, when it reached Dayton, Ohio, simultaneously with the occurring of a great flood there. The magnitude of the flood was such that it resulted in the loss of the lives of approximately 100 people, 1,500 horses and the destruction of $75,000,000 in property. Dayton, a city of 117,000 population, was inundated, buildings destroyed, freight houses flooded, railroad tracks, bridges and trestles, including the bridges over Miami River, washed away. This car of poultry, together with several cars of hogs and other freight, was marooned by the waters of the flood, but happened to be standing upon a track located upon an embankment in the northern part of the city, surrounded by water, and the tracks of the railway at either end washed out and destroyed. As a result of the flood the Governor of the State of Ohio, by proclamation, declared martial law in Dayton and Montgomery County, in which the city is located. As appears at page 79 printed record, "it is agreed that the Governor of Ohio proclaimed martial law in that county and sent the militia there, and when they came there they took possession of the civil

authority." The state militia of the state, the adjutant general—General G. H. Wood, in command—was sent to Dayton and took charge and control of the affairs of the city, put the city under martial law, took charge of the city government and possession and control of all property in the city, including the railroads and all of the shipments of freight thereon in said city at said time. "The military authorities had possession of the railroad tracks and property of the Cincinnati, Hamilton & Dayton Railroad Company through Dayton." (Printed Record, 158.) The military authorities applied cards to cars, giving notice that same could not be moved or their contents disturbed without the order of the commander. (Printed Record, page 158.) It was necessary for all persons going upon the tracks to obtain permission from the militia and nothing could be brought in or taken out without the written authority of the military power, no matter what it was. A car could not be moved without such permission, and all food supplies and clothing were distributed under the commissary department of the military power there. The City of Dayton was divided into military zones, five in number, and the various zones placed in charge of commanding officers.

When the car of poultry in question arrived in Dayton it was accompanied by a caretaker, Mr. Shipley, whose duty it was to feed and water the poultry and look after it enroute. After the car arrived in Dayton and was marooned by the flood, the city under martial law and great privation and suffering on the part of the people there, the military officers took possession of the car, confiscated the shipment and used the contents to provide the flood sufferers with

food. In like manner numerous cars of hogs were confiscated and used for like purposes. It is also true, as stated by General Wood, that food supplies and clothing were confiscated by the military authorities for the benefit of the flood sufferers, regardless of whether such clothing and food were in the possession of grocers or other dealers or located upon railroads within the city.

The caretaker in charge of the car for the defendant in error requested Colonel Volrath, in command of the zone, to take the chickens off his hands, stating that he was out of feed and that if this was not done, they would die. (Testimony of Major Smith, Printed Record, 86.) Investigation was made by the military authorities, and pursuant to the order of the commander, the shipment was confiscated for the benefit of the flood sufferers.

It is urged by defendant in error that the C. H. & D. Railroad Company, connecting carrier, induced the military authorities to take charge of and confiscate the shipment. The plaintiff in error urges that there was in fact no proof offered upon the trial below which was competent or proper to establish this contention. The basis upon which the defendant in error rests its contention is that a postal card was received by the military authorities purporting to be from some agent of the C. H. & D. R. R. Company, calling the attention of the authorities to this car and that some person called by telephone, who represented himself as the agent of the C. H. & D. Railroad Company, requesting the military authorities to give this car attention, stating that they were unable to move the car, that it had been abandoned, the poultry was dying, and advised that it

be used for the hospitals and sick. There was no evidence whatsoever tending to establish the name of the person writing the card or the name of the person who called by telephone, and no evidence whatsoever tending to establish that such person or persons were the authorized agents of the C. H. & D. Railroad Company.

Upon the trial of the cause the defendant in error offered in evidence letter bearing date Newark, N. J., March 20, 1913, addressed to Chas. Collins Company, Jay and West street, New York, signed by C. E. Barker & Co., as follows:

> "As per telephone conversation we hereby confirm sale of L. P. T. Car #739 at the following prices delivered Newark, N. J. Fowl and chickens, 20c, roosters 14c, ducks 22c, and geese 14c. Car to be shipped out not later than March 22nd, 1913."

To which objection was made by plaintiff in error and the same was admitted over said objection. (Printed Record, page 46.) The bill of lading introduced by defendant in error provides: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property, being the *bona fide* invoice price, if any, to the consignee (including the freight charges) if prepaid at the place and time of shipment." (Printed Record, page 40.)

Upon the trial of said cause the defendant in error offered in evidence, and the same was admitted over the objection of plaintiff in error, defendant in error's Exhibit E, as follows:

Collins Produce Company
Incorporated

Wholesale dealers in Poultry, Butter, Eggs, Etc.

General Manager:
J. Cyril Begg

General Offices
Mt. Vernon, Ill.

100

Mount Vernon, Illinois
July 21, 1913

Claim of Collins Produce Company of Mount Vernon, Ill. against the C. & E. I. Railroad Company, Mr. W. C. Ellison, Agent, Mount Vernon, Illinois and William J. Jackson and Edwin W. Winter of the C. & E. I. Railroad Company as Receivers of the said Railroad Company

GENTLEMEN—

On March 21, 1913, the Collins Produce Company shipped from Cypress, Illinois, L. P. T. Car 739, consigned to C. E. Barker and Co., destination, Newark, New Jersey, containing live poultry as follows:

| | | | | |
|---|---|---|---|---|
| Fowls,— | 19268# | at | 20c..... | $3853.60 |
| Cocks,— | 1368 | | 14c..... | 191.52 |
| Chickens | 1139 | | 20c..... | 227.80 |
| Ducks | 273 | | 22c..... | 60.06 |
| Geese | 206 | | 14c..... | 28.84 |
| Turkeys | 227 | | 20c..... | 45.40 |
| | | | | $4407.22 |

This car has not been delivered to Barker & Company and by agreement we were to deliver this poultry in Newark, New Jersey. The agreement in relation hereto with Barker & Company was on April 21, 1913, cancelled by Barker & Company on account of non-delivery.

We therefore make this claim for the value of such poultry, viz., $4407.22, and respectfully request the prompt payment thereof.

Yours truly,

COLLINS PRODUCE COMPANY
J. CYRIL BEGG
*Vice-Pres.*

Received of Collins Produce Company a copy of the above and foregoing claim this, the 21st day of July, 1913.

W. C. ELLISON
Agt. C. & E. I. R. R. Co. and as agent of W. J. Jackson and E. W. Winter, as receivers.

Printed Record, pages 50-51 purporting to be claim made by the defendant in error against the plaintiff in error.

At the conclusion of plaintiff's evidence on the trial before the U. S. District Court, and again at the conclusion of all the evidence, the plaintiff in error moved the court to direct a verdict in its behalf, but said motions were overruled and the cause submitted to the jury. The jury returned verdict in favor of the defendant in error for the sum of $4,195.82. Motion for new trial was made and overruled, and judgment entered upon said verdict; whereupon plaintiff in error prosecuted its writ of error to the U. S. Circuit of Appeals for the Seventh Circuit, where the judgment of the U. S. District Court was affirmed. (Opinion U. S. Circuit Court of Appeals, Printed Record, pp. 222-227, incl.) to reverse which judgment this writ of error is prosecuted.

## II.

### ERRORS RELIED UPON.

*First.* The United States Circuit Court of Appeals erred in its holding and opinion to the effect that where martial law is declared and exists, and the military commander there enforcing such law has seized and holds possession and control of the railroad situated in the

military zone, together with all freight in transit thereon located, to the exclusion of the officers and agents of such railway, that statements, suggestions and advice made or given by one who before military law was declared, was an agent or officer of the connecting carrier, are binding upon the initial carrier, and in not holding that any statements, if any, made by such persons at such time, were not binding upon such carrier.

*Second.* The United States Circuit Court of Appeals erred in holding in a case where the loss occurred on the line of a connecting carrier and the suit is against the initial carrier, that "the loss being established, defendant's liability was the common law liability of a carrier" and that "the trial court properly concluded that the Carmack Amendment to the 20th section of the Act to Regulate Commerce did not change the common law rule or restrict the liability of the carrier" (Printed Record, p. 224) in such case.

*Third.* The United States Circuit Court of Appeals erred in failing to consider the common law rule by virtue of which the carrier could by contract limit its liability to its own line, thereby misconstruing the 20th section of the Carmack Amendment to the Act to Regulate Commerce, and especially the following language therein contained—"shall be liable to the lawful holder thereof for any loss, damage or injury to such property *caused by it* or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass."

*Fourth.* The Circuit Court of Appeals erred in holding that where by an act of God—an unprecedented flood—a condition is produced which renders a connecting carrier unable to transport freight then in transit, and when so situated martial law is declared and military district or zone established in which is situated the freight, and thereupon the militia, acting un-

der orders of commander, seizes and confiscates the shipment, after having assumed martial authority over the lines and property of the carrier in the military district or zone, that the initial carrier is liable upon the grounds or for the reason that one who was an agent of connecting carrier at the time martial law was declared recommended that military authority use the freight to relieve flood sufferers; and in holding that under such conditions the initial carrier is bound by such act of such agent of connecting carrier; and in holding such evidence proper to be considered as having influenced military action.

*Fifth.* The United States Circuit Court of Appeals erred in not holding that the United States District Court erred in admitting in evidence the letter from C. E. Barker & Co. to Chas. Collins Company (page 46, Record), and the paper purporting to be claim of defendant in error against plaintiff in error (Record pages 50 and 51 mentioned above), and plaintiff in error says that same was improper as bearing upon amount of damages to be awarded, in that said instrument set out sale price of said car of poultry at Newark, N. J., and not in the invoice price at the time and place of shipment in accordance with the terms of the bill of lading. The said bill of lading provides "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid), at the place and time of shipment, under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification and tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

*Sixth.* The United States Circuit Court of Ap-

peals erred in holding in effect that where one party to suit reads in evidence the depositions taken on its own behalf or by adverse party, such reading increases or extends the probative force of statements contained in such depositions, in this, that herein the United States Circuit Court of Appeals held that there is evidence in the record establishing agency between the C. H. & D. R. R. Co. and the unidentified party who wrote postal card to Colonel Vollrath, and the unidentified party who called by telephone Lieutenant Clark, chief clerk to the adjutant general, when there is no proof in the record connecting such persons with or showing that either was authorized to act for or on behalf of such carrier.

*Seventh.* The United States Circuit Court of Appeals erred in not reversing the judgment of the United States District Court.

## III.

## BRIEF OF THE ARGUMENT.

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The shipment involved was received by the plaintiff in error on March 21, 1913, and promptly forwarded to Salem, where same was delivered to B. & O. S. W. Railway, the first connecting carrier, and was by that line promptly handled to Cincinnati and there delivered to the C. H. & D. R. R., which line moved same forward until it reached Dayton, Ohio, where the flood intercepted and prevented the further movement of the car. The primary cause of the loss was the flood, the occurrence of which made necessary the declaration of martial law and the enforcement of military rule to maintain order and preserve life. This culminated in the confiscation of the shipment; thus the act of God, in fact prevented the connecting carrier from performing its duty. It is fundamental that the carrier is relieved from the performance of its duty to carry where it is prevented by an act of God.

*Memphis and Charleston R. R. Co.* v. *Reeves*, 77 U. S. 176 (10 Wallace); 19 L. Ed. 909.

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It is unquestioned that martial law prevailed in the City of Dayton and County of Montgomery at the time in question. It is admitted that civil government and authority there had been overthrown and that the military authority was in control. Mar-

tial law is of necessity arbitrary. It is administered by the commander whose will is the law. Such law is the offspring of necessity and transcends the ordinary course of law.

*United States* v. *Diekelman,* 92 U. S. 520; 23 L. Ed. 742.

*In re* Egan, 8 Fed. Cas. 367.

*Griffin* v. *Wilcox,* 21 Ind. 370.

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We note the statement in the opinion of the United States Circuit Court of Appeals (Printed Record, 225):

> "It is obvious, however, that the mere declaration of martial law would not relieve a common carrier operating in the district thus covered of all liability to the shipper," citing *I. C. R. R.* v. *McClellan,* 54 Ill. 71.

The McClellan case is not in point. In that case "the military authority only required the company to give a preference in transporting property to that designed for the use of the government. (Opinion, page 73.) In that case, while it was shown "that the military authorities gave orders or permission to ship military stores or grain and forage designed for the use of the army, they failed to show any interference on the part of the army officers which prevented the company from sending this grain forward in the usual time." (Opinion, pp. 70-71.) In the case at bar, an act of God destroyed the tracks and bridges of plaintiff in error's connecting carrier, caused great loss of life and property and rendered it impossible for the carrier to move the shipment. Thus situated, martial law was declared, the carrier ousted of possession and con-

trol of its property and of the shipment, and by order of the commander same was confiscated for the use of the flood sufferers. The contract with the shipper exempted the carrier from liability for loss "caused by act of God the public enemy, quarantine, authority of law." * * * By the order of the authority of law (martial law) the shipment was confiscated. Herein the distinction between the case at bar and the McClellan case, *supra*.

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The provision of the Federal statute relied upon by the defendant in error, commonly known as the Carmack amendment, is:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.
>
> That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whole line the loss, damage or injury shall have been sustained the amount of such damage or injury as it may be required to pay to the owners of such property as may be evi-

denced by any receipt, judgment or transcript thereof."

Federal Statutes Anno. Supplement 1909, pp. 273-274.

This provision of this statute, particularly the language "CAUSED BY IT or by any common carrier, railroad or transportation company to which such property may be delivered," has received construction by this court, in the case of *Adams Express Co.* v. *Croninger*, 226 U. S. Rept. 491; 57 L. Ed. 314, where it was said (Opinion, p. 320):

> "What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for their loss, damage or injury from any and every cause would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage' would be to ignore the qualifying words 'caused by it.' The liability thus imposed is limited to 'any loss, injury or damage caused by it' or a succeeding carrier to whom the property may be delivered and plainly implies a liability for some default in its common law duty as a common carrier."

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The United States Circuit Court of Appeals (Printed Record, 224) quotes language of court in *Cincinnati, New Orleans & Tex. Pac. Ry.* v. *Rankin*, 241 U. S. 319, wherein the court after referring to the *Croninger case, supra*, says: "Properly under-

stood, neither this nor any other of our opinions holds that this amendment has changed the common law doctrine heretofore approved by us in respect to the carrier's liability for loss occurring on its own line." In the *Rankin* case where this language was used the suit was by the shipper against the *initial* carrier and discusses its liability for a loss occurring on its *own* line—not on the line of a connecting carrier.

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The contention of defendant in error is, that notwithstanding its suit as based on the provision of the Carmack amendment as set forth in its declaration, the burden does not rest on it to prove that the loss claimed was caused by the connecting carrier. That in order to make out its case it was only required to introduce the bill of lading, prove the delivery of shipment to the carrier issuing same (the initial carrier), that shipment was not delivered at destination, and the value of same, and that such proof raised the presumption that shipment was lost through neligence of the carrier, and that the burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon plaintiff in error.

If the contention of defendant in error as to burden of proof be adopted, we submit that this record establishes that the loss resulted from a cause for which the initial carrier was not responsible in law or by contract.

It is admitted that if by the act of God the shipment was marooned, the facilities, tracks, embankments, bridges and trestles of the carrier washed away by the flood, and that before shipment could be

forwarded same was seized and confiscated by military authorities acting under martial law. Such proof, we submit, presents a case where the carrier is not responsible in law. The contract (bill of lading) provides that "no carrier nor party in possession of any of the property herein described shall be liable for any loss thereof, or any damage thereto or delay caused by the act of God, the public enemy, quarantine, authority of law, or the act or default of the shipper or owner." We submit that under the ad-shipper or owner." We submit that under the admitted facts the plaintiff in error is not liable on the contract.

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In this case defendant in error seeks to overcome the evidence relating to the flood—the act of God—and the confiscation of the shipment by the state militia acting under martial law as the cause of the loss of the shipment, by the contention that some unknown and unidentified person talking over a telephone advised an officer of the militia to take charge of the shipment, it being contended by defendant in error that such unknown and unidentified person represented himself to be an agent of the connecting carrier, the C. H. & D. R. R. Co. We contend, first, that even though an agent of the C. H. & D. under the circumstances had made such suggestion, that such would not in law, under the facts shown to exist, have been the cause of such confiscation.

The law is, before the C. H. & D. R. R. Co., the connecting carrier here, could be made responsible for the acts and declarations of an individual, that there must be legal evidence establishing the authority of such individual to act in the matter as an agent of the C. H. & D. Railway Company. *U. S.* v.

*Boyd*, 5th Howard, page 29, opinion, page 48; 12 L. Ed., page 36, opinion, page 45. Before the statement or conversation of the supposed agent of the C. H. & D. Railway Company could be binding upon such railway company, the agency must necessarily be established by proper evidence. Vol. 31, Cyc., page 1652.

The law is, that before the declarations, statements, or admissions received over the telephone, as same were alleged to have been received in this case, can be evidence the witness or person who received the communication by telephone must be able to testify that he knew and recognized the voice of the man talking, and this is especially true where the alleged agent himself called the witness by telephone. Vol. 12, Cyc., page 423; *Obermann Brewing Co.* v. *Adams*, 35 Ill. App. 540; *Kimbark* v. *Ill. Car & Equipment Company*, 103 Ill. App. 632.

In the case here the witnesses testifying to the telephone communication, none of them knew the voice of the person; had ever seen or conversed with him, had no knowledge of such person having any connection whatever with the C. H. & D. R. R. Company, and there is no evidence in the record tending in any way to establish the relation of principal and agent between the Railroad Company and the person who called over the telephone and did the talking in question; and the superintendent and agent of the Railroad Company most positively deny ever having had any such telephone communication and state that telephone communication was impossible from the freight office of the C. H. & D. Railroad Co. at that time because the same had been destroyed and that carrier had no telephones in service. It

is an indispensable requisite to the admission of the declarations of an agent as a part of the *res gestae* that such agency or authority be first proved. Jones on Evidence, 2d Ed., paragraph 356, page 445, and cases cited. Such agency cannot be proved by the declarations themselves, no matter how publicly made, nor by such declarations accompanied by acts purporting to be in behalf of the principal unless they are brought to his knowledge. Jones on Evidence, *supra.* A relation of agency sufficient to admit the statement offered must first be established by affirmative evidence direct or inferential dehors the declaration of the agent. Vol. 16, Cyc., 1065-6, and cases there cited.

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The bill of lading (Rec., 40) as to the measure of damages, provides:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment, under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon, or is determined by the classification and tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence."

The court as bearing upon the measure and amount of damages, admitted in evidence the letter of C. E. Barker & Co. addressed to Chas. Collins Co., New York, of date March 20, 1913, stating the selling

price at Newark, N. J. (Rec., 46), and the court upon the trial (Rec., 48) in passing upon objection, stated:

> "It is perhaps cross-examination to show his knowledge of the business, but as I stated before, the witness stated, and I think that is a matter of inference, that the property, after they had sold it for what the letter stated and paid the freight on it, as they say they did, was worth at the time and place of shipment just what they sold it for—there isn't any question about that,"

and in the charge to the jury upon this question, the court said (Printed Rec., 204):

> "Of course I might say that if you find for the plaintiff, you are to determine the value of this property, and the value is to be determined by, the bill of lading, says its invoice price, if there is an invoice price—there is a contract price here and you can determine it from that—the property was worth what it sold for—if you can find out how much property there was—of course there was some evidence that this property had deteriorated somewhat."

It is proper and legal for carrier to contract as to amount to be paid in case of loss of shipment for which it is liable.

> *Adams Expr. Co.* v. *Croninger*, 226 U. S. 491; 57 L. Ed. 314.

A regulation that the liability of the carrier in case of loss shall be limited to the invoice value of the goods, is a reasonable regulation as to the damage to be recovered and is valid. So a stipulation that the liability for loss shall be measured by the value at place of shipment, is generally upheld.

> Vol. 6, Cyc., 401.
>
> *Mo. Pac. Ry.* v. *Harper Bros.*, 121 C. C. A. 570; 201 Fed. 671.

The validity of this provision in a bill of lading was recognized by this court in the case of

*N. Y. & N. R. R.* v. *Peninsula Produce Exchange*, 240 U. S. 41.

The burden was on defendant in error to make out its case, and this extends to proving its damages in accordance with the terms of bill of lading which defendant in error introduced by competent evidence. It failed to offer evidence of the invoice price at time and place of shipment, and sought to recover sale price which included profit made by it on the sale of goods, and thereby was enabled under the holding and charge of the court here to recover profits, notwithstanding the very object of the provision in the bill of lading was to preclude the right of shipper to recover such.

The court below held that the letter (Plaintiff's Exhibit "D," Pr. Rec., 56) established the invoice price. The court said (Pr. Rec., 47):

> "The bill of lading refers to the invoice price and the price in the letter meets that."

The letter refers to sale price delivered in Newark, N. J., and not to the cost of poultry at Cypress, Ill., the place of shipment. The invoice price is the cost or value of property at the shipping point.

Vol. 4, Words and Phrases, page 3762.

The absence of an invoice will not prevent the operation of a stipulation in a carriage contract that the carrier's liability for loss shall be limited to the invoice price at the point of shipment but the

value of the property at that point will be the measure of damages.

*Pierce* v. *Southern Pacific Co.*, 40 L. R. A. 350 (Old Series).

There is no evidence of the carrier here having had notice of special contract for sale at specified price at the point of delivery to consignee, and in the absence of such notice to the carrier it cannot be held for such sale value.

Vol. 6, Cyc., page 450.

## V.

## ARGUMENT.

AN ACT OF GOD—A FLOOD—RESULTING IN CONFISCATION OF SHIPMENT UNDER AND PURSUANT TO MARTIAL LAW ABSOLVES THE CARRIER FROM LIABILITY.

Certainly no stronger case could be presented, in its facts, establishing justifiable reason or excuse for relieving a carrier of liability to a shipper than that state of facts which is presented by this record.

It is our contention that on the uncontroverted facts there is no legal liability as against plaintiff in error; that the paramount error exists in the District Court denying motion to direct verdict in favor of plaintiff in error, and the Circuit Court of Appeals in sustaining the District Court in this respect.

The United States Circuit Court of Appeals, in its opinion (Pr. Rec., 225) says:

> "The District Court was amply justified in submitting to the jury the question of whether the property was taken and seized by the military authorities by and upon the invitation of the carrier, provided the determination of this issue imposes a liability upon the carrier."

This proviso forms the basis for one of the controlling questions of law submitted to this court for decision herein. As also stated in the opinion of the Circuit Court of Appeals (Pr. Rec., 225):

> "The trial court accepted the view most favorable to the defendant (plaintiff in error) and concluded that martial law in its fullest sense

> was in fact declared, that the governor of the state had full authority so to do and that he exercised his power in the case and was amply justified in exercising such power, and that General Wood, in charge of the military forces, acted within the power delegated to him by the governor."

This conclusion of the District Court is fully supported by the undisputed proof in the record. Counsel for defendant in error (Pr. Rec., 79), as an admission of record stated:

> "It is agreed that the governor of Ohio proclaimed martial law in that county and sent the militia there, and when they came they took possession of the civil authority."

This in response to statement by counsel for plaintiff in error that the position of plaintiff in error was that after martial law was proclaimed, plaintiff in error no longer held the shipment as a carrier. The uncontroverted proof in more detail establishes that the militia acting under orders of the adjutant general enforcing the proclamation of martial law, took charge and control of the affairs of the city; took charge of the city government; took possession and control of the railroads and all property at the time there on the tracks of the railroads; ousted the officers and agents of the carriers of possession of the railroad tracks, cars and shipments there situate, refused to allow any one to go upon the tracks (even Mr. Corcoran, who was superintendent of C. H. & D. R. R. at time flood occurred) without a military pass (Pr. Rec., 158); the militia carded all cars, directed the movement and disposition of same; nothing could be brought in or taken out without written order of the military officer. The people

received food and clothing from the commissary, issued to them by soldiers, and numerous shipments of animals and provisions were confiscated to procure food for the sufferers. As stated by General Wood, food supplies and clothing were confiscated by the militia and used for the benefit of flood sufferers, whether such clothing and food was in the possession of grocers or other dealers or in the possession of railroad carriers. Such was the unrestricted and unlimited enforcement of martial law in the City of Dayton before and at the time the shipment in question was confiscated pursuant to the order of the commanding officer, whose will was law.

Under these circumstances, the question arises, even though a person who prior to the proclamation of martial law was the superintendent of a carrier, should, after the carrier is ousted of possession and control of its facilities and shipments in transit there, state to the commander that he, such person, thought it best to confiscate the shipment, or should advise that conditions were such that he, such person, recommended confiscation,—would such be the act of the carrier? In such case, can such person so situated, out of control of the property of the carrier, and when such property has already been seized by the militia, be held to be the agent of the carrier in making such statements? Is the Circuit Court of Appeals correct when it announces the law to be that such statements impose liability upon the carrier?

We can agree with the opinion of the Circuit Court of Appeals that "We find few precedents to guide us in a case like this one;" indeed we may add that

we find no reported case in point. Yet even though the question be one of first impression, it is not for that reason intricate. We conceive the law in such case to be that an act of God—a flood—resulting in confiscation of shipment under and pursuant to martial law absolves the carrier from liability; that after the shipment has been seized by the militia and is out of the possession and beyond the control of the carrier and the facilities of the carrier taken away from it by force of martial law, it cannot be charged with liability upon the ground that some one who was its agent before or at the time the cause arose making necessary martial law government, suggested that it would be best to confiscate the shipment. In such case no negligence is chargeable to the carrier. In such case it cannot be said that the defence interposed has been met. In such case such suggestion of such person does not render the carrier liable upon the ground that thereby it caused loss.

Where, as here, by force of arms, and by operation of martial law the carrier is denied management, control and possession of its railroad facilities and goods remaining in the zone, and its officers, agents and servants by the arbitrary order of the commander, whose will is the law, divested of power to act for the carrier, nothing remains of the authority once vested in such persons as agents under the civil law, for in the military zone civil law is suspended. The carrier could not, in such case, act by its agent because under martial law, as there administered, the power or right to so act is denied the carrier, and such being true, there could be no active binding agency.

We respectfully contend that even though persons who were, before the existence of the military rule in the zone, agents of carrier suggested or advised disposition of the shipment, such would not render the carrier liable for the loss occasioned by the confiscation.

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## V.

### BEFORE A CARRIER CAN BE HELD LIABLE FOR THE ACTS AND DECLARATIONS OF AN INDIVIDUAL, THE AUTHORITY OF SUCH INDIVIDUAL TO ACT AS AN AGENT OF THE CARRIER MUST BE ESTABLISHED.

The United States District Court held, in effect, that even upon the state of case presented upon the admitted facts, as to the act of God, and the confiscation of the shipment by the militia acting under martial law, nevertheless if one who was an authorized agent of the connecting carrier at the time martial law was proclaimed, after that time invited the confiscation, that the initial carrier was liable. In its charge to the jury the court stated:

> "The defendant is only liable in this case for the failure of the Cincinnati, Hamilton and Dayton Railroad to discharge the duty cast upon it by law. It was its duty, of course, to transport this property if it could do it. It could not overcome the flood; it could not overcome the action of the military authorities if the military authorities acted on their own volition, and the only question in this case is a question of fact and a very simple one, and it is this: Whether from all the evidence you believe that this property was taken and seized by the military authorities by and on the invitation of the Cincinnati, Hamilton and Dayton Railroad or any of

its authorized officers and agents. That is the only question you have to decide in this case." (Pr. Rec., 203-204.)

The United States Circuit Court of Appeals, in its opinion (Pr. Rec., 226) says:

> "Nor did the court err in concluding that these facts, if found in favor of the shipper imposed a liability upon the carrier. If the military authorities took the car at the request of the carrier and would not have done so but for such request, can it be said that the loss was caused by 'the act of God' or 'the authority of law?' We think not."

We have above presented our view as to the law applicable in such case, and here we desire to point out the error based upon the rule as held by the Circuit Court of Appeals.

Even if the view of that court as to the law should be sustained it would be indispensable that agency be established between the individual purporting to act for the carrier, in making such request, and the carrier.

The law is that before a carrier can be made responsible for the acts and declarations of an individual, the authority of the individual to act for the carrier must be established.

In order for the statements of the supposed agent to be binding it is necessary that the agency exist. If a party relies upon the declarations or statements of another as binding upon a third person, the party so relying has cast upon him the burden of establishing the authority of the second to act for the third.

Agency will not be inferred from the fact that third persons thought agency existed, nor because an

alleged agent assumed to act as such, nor because the conditions and circumstances were such as to make such an agency seem natural and probable and to the advantage of the supposed principal, even.

The question of law which we here present is whether the admitted facts establish the relation of principal and agent between the person writing the postal card in question to Col. Vollrath, and the persons who communicated by telephone with Col. Vollrath, Assistant Adjutant General Clark and the C. H. & D. R. R. Co., that is, whether or not said persons so writing and so communicating were the agents of the carrier. Let it be admitted that some person representing himself to be superintendent of the connecting carrier at the time in question wrote the postal card referred to in the evidence of Col. Vollrath (Pr. Rec., 151) where this witness states:

> "I think, it just occurs to me that about this time I received a postal card from an official of the C. H. & D. Railroad, calling my attention to this car of poultry, and urged that I give it attention, and a few days afterwards I received a telephone communication from him along the same lines. My recollection is that it was either the superintendent or assistant superintendent but I do not recall the name.
>
> Q. You speak of having received from the C. H. & D. Railway Company a card with reference to this poultry—have you the card?
>
> A. I didn't find it—I looked for it.
>
> Q. Do you think you have the card?
>
> A. I can't find it—I don't know where it is if I have it.
>
> Q. What is your best judgment as to whether or not you preserved it?
>
> A. My clerk and myself searched for it

among my office files relating to this matter and we have failed to find it.

Q. I wish you would state who this card was from?

A. I don't remember the name of the gentleman—he was an officer, as I remember it, of the C. H. & D. Railroad.

Q. What was the purport of the communication?

A. This car of chickens needed attention and urged me to take care of it or take possession of it—I don't remember which.

Q. You also stated you had a telephonic communication?

A. Yes sir, calling my attention to the fact that his request had not been complied with.

Q. Who was that from?

A. The same gentleman.

Q. Remember the name?

A. I don't remember the name.

Q. Was it Fleming?

A. I don't think.

Q. Was it Mr. Corcoran?

A. That sounds more familiar—what was his position?

Q. Mr. Corcoran was division superintendent at the time.

A. It was either the superintendent or assistant superintendent—it might have been division superintendent, but I would not say positively.

Q. And the telephonic communication had again requested you to take charge of the poultry?

A. Yes, sir."

And let it also be admitted that some person representing himself to be freight agent of the connecting carrier called by telephone and had conversation with Assistant Adjutant General Clark, as disclosed by the testimony of that witness. (Pr. Rec., 174.)

"A. As assistant adjutant general I had charge of the routine work at headquarters, and one afternoon I was called by some one who said he was the freight agent of the C. H. & D. He stated that there was a car load of chickens, poultry, located on the tracks in North Dayton —that it had been reported that the poultry was dying—that they were unable to move the car out of the city, and it would seem best to dispose of the contents of the car. Now, to the best of my knowledge, he said he thought it was best that we take the stock of chickens and distribute them among the hospitals, as they were dying, and they could not move them. This agent * * * stated that in the interests of the people who were suffering for food at that time, and as these chickens were dying, they would recommend that they be taken from the car—be taken by the military authorities. I told him that I would simply report the matter to the commanding general. I didn't have any authority to make a decision of the matter. But this last sentence here is really just an opinion. He said 'there is a carload of chickens on our siding in North Dayton which we are unable to move. We have just been informed that they are dying—that there is no food for them' and that he thought it was best that the military authorities take over those chickens and distribute them among the poor—the hospitals."

This was reported to General Wood.

"I only know of one time, that is, when I talked. After that the matter was out of my hands. Now, I said to the agent, I said, 'Do you recommend that we take those chickens?' They said they would recommend it. I remember asking that question over the phone, because he knew more about the condition of things than we did.

Q. Now do you know the name of the agent —did the agent give you his name that was talking to you?

A. No, sir—he said, 'This is the freight agent talking.'

Q. Freight agent or some one in the freight agent's office?

A. He said, 'This is the freight agent talking of the C. H. & D.'

Q. Lieutenant, are you commissioned as an officer of the Ohio National Guard?

A. Yes, sir, in the Third Ohio Infantry.

Q. As a first lieutenant?

A. Yes, sir.

Q. Of course you had no means of knowing this person who called up, except what he said to you?

A. No, sir.

Q. You didn't know his voice or any other means of knowing him, and you had only the one conversation?

A. That is all, sir."

We likewise refer to the testimony of Adjutant General Wood. However, the adjutant general never claimed to have received any communication from any person who purported to be an agent or officer of the connecting carrier. Upon this point General Wood's testimony appears at pages 164-166, printed record:

"A. I was military commander of the Dayton Military District, covering Montgomery County, Ohio, under the orders of Governor James M. Cox—said district having been placed under martial law by proclamation of the governor.

Q. I will ask you if during that time you received any information with reference to a car of live poultry in the possession of the C. H. & D. Railroad Company?

A. Yes, sir.

Q. From whom or through whom did you receive this information?

A. At that time my headquarters were at

the Hotel Algonquin, corner Third and Ludlow streets. The City of Dayton was divided into five military zones. Colonel Edward Vollrath, commanding officer 8th Infantry O. N. G. was commander of the first military zone, covering North Dayton—and the first information I had in regard to a carload of chickens was received over the telephone from Col. Vollrath and communicated to me by some officer on duty in my office.

Q. When was the second information, if you received any later information?

A. My recollection is that there were several communications from Colonel Vollrath in regard to this carload of chickens. Later the C. H. & D. telephoned my office in regard to the same. I did not personally receive any telephone messages but they were reported to me by the officers who personally did the talking.

Q. What report did you receive from your subordinates with reference to the telephone communications to you by the agents of the C. H. & D. Railroad Company?

Mr. Dick: Defendant objects to the question as calling for hearsay testimony.

A. It was reported to me that the C. H. & D. through some person in their freight department stated that they were unable to move this car of poultry—that the car had been abandoned by the parties in charge of it; that the poultry was dying, and that no food could be obtained for the same; and they advised that it be used for the hospitals and sick of whom there were quite a number in the City of Dayton at that time.

Q. Did you act under that advice, General Wood?

A. After getting in communication with Colonel Vollrath over the telephone, and receiving from him corroboration of the statements made by the Railroad Company, I directed him under the circumstances of the case to take possession of the car of poultry and use the same for the benefit of the hospitals and the sick.

Q. Did you take any steps toward the taking into custody and disposition of this car of poultry until after the request or advice of the agents of the Railroad Company?

A. I did not direct Colonel Vollrath to take possession of the car of poultry until after I received the communication from the Railroad Company.

Q. How many communications came to you from the office of the Railroad Company with reference to your taking and disposing of this car of poultry?

A. After the lapse of a year's time, as at the time in question I was very busy running the affairs of the city, I would not care to state positively; but I should say that it was reported to me at least twice. It is hard to recollect the exact number of times, but I think it was at least twice. It was reported to me by my subordinates in the office. I had no telephone communications myself.

Q. From what department of the C. H. & D. Railroad was this information received?

A. I was told that it was received from the freight department—local freight department.

Q. In Dayton?

A. Yes, sir.

Q. As to the actual condition of this poultry, you know nothing of your own personal knowledge?

A. Absolutely nothing, my information, as far as the military proposition was concerned, was derived from the report made to me over the telephone.

Q. And also from the request by the Railroad Company?

A. Well, to a certain extent yes—but the absolute facts to the condition, I relied upon Colonel Vollrath's statement.

Q. Personally you know nothing of the amount of feed on hand—you know nothing personally of whether Mr. Shipley, who was in charge had abandoned the car?

A. I acted upon the advice received from Colonel Vollrath, an officer of long standing in the National Guard. I never saw the car myself—had no opportunity to see same.

Q. And as I understand you, you were influenced principally and your course finally determined by the reports made to you by your Colonel commanding the zone in which the car was situated at the time—that is Colonel Vollrath? (Rec., p. 168.)

Question objected to by plaintiff.

A. The practical agreement of the statements made by Colonel Vollrath and whoever telephoned from the C. H. & D. office governed my conduct.

Q. You understood from the information received from the railroad office that it was entirely agreeable with them for you to dispose of this car of poultry?

Mr. Dick: Defendant objects to this question, both as leading and asking a conclusion of the witness and being otherwise irrelevant and immaterial.

A. 'Entirely agreeable' is probably putting it too strong.

Q. Well, leave out the word 'entirely'—and answer the question with that word eliminated.

A. The railroad company, as reported to me, stated certain facts and certain conditions.

Q. Why would they report it to you?

A. I had command of the Dayton military district.

Q. They knew that.

A. Yes, sir. And acting upon these facts and conditions, as corroborating the report made by Colonel Vollrath, I directed Colonel Vollrath to take possession of the poultry. I want to be fair in this to everybody, and therefore I say that the words 'entirely agreeable' would be putting it a little bit too strong.

Q. Well, General, under the conditions that existed there, from the information received from the office of the railroad company, did you

understand that it was agreeable and not objectionable to them that you make a disposition of this poultry?

Same objection by defendant.

Q. In other words, that you had their consent?

A. The word 'consent' is not a very good word to use in this connection, under martial law. The authority of an officer in command acting under martial law is supreme—and to use the word 'consent' would be rather in contradistinction to martial law. (Pr. Rec., 170.)

Q. It is true, then, General, that it was after repeated requests from the office of the railroad company that you took charge of this car of poultry?

A. As I said, Mr. Gilbert a few minutes ago in my testimony, that testifying under oath and having had no conversation with the railroad company myself, I have simply got to remember what happened at the time—and whether there were more than one request, or rather the matter was brought to my attention in my office more than once, I cannot say; because I had no telephone communications myself with the railroad company. (Pr. Rec., 171.)

Q. I will just reverse the question—through your subordinates did you receive information to take and dispose of this car of poultry, at the request of the agents of the C. H. & D. Railroad Company?

Mr. Dick: Defendant renews all the objections made to the former question.

A. I understand the question—there is no question about that—what I want to do is to answer the question fully and truthfully, to the best of my knowledge and ability. That is what I want to do.

Mr. Dick: Defendant also objects to this question on the ground that it is mere repetition, having been fully gone into in chief.

(Question 82 read.)

A. The agent of the C. H. & D. Railroad

Company, according to reports received by my subordinates and transferred to me, made the reports in regard to the condition of the car referred to in my previous testimony, and advised that some action should be taken in regard to the car. I make this answer after a careful consideration of the entire matter and reference to my letter of August 21, 1913. Considering that the word 'request' used in that letter might possibly be too strong a word, I would now, testifying under oath, in the letter use the word 'advise' instead of 'request.' (Pr. Rec., 173.)

By Mr. Dick: Q. General, just one question —it was not reported to you at any time during these telephone conversations who it was at the C. H. & D. freight house that was doing this talking, was it?

A. I was told it was the agent." (Pr. Rec., 173.)

The depositions which contain the above statements of witnesses were taken on behalf of plaintiff below—defendant in error—but were not read by it on the trial of the cause. The depositions were introduced upon the trial by the defendant below—the plaintiff in error.

In addition, Mr. Corcoran, who was at the time of the happening of the flood, superintendent of the connecting carrier, and Mr. O. B. Groves, who was the local freight agent of the connecting carrier at said time, were called as witnesses on behalf of plaintiff in error and as bearing upon the writing of the card in question and the telephone communications referred to, testified. We quote the evidence of these witnesses in so far as it relates to this subject. Mr. Corcoran testified (Pr. Rec., 159):

"Q. I will ask you to state if, before this car was taken over by the military authorities

there to unload, if you wrote a postal card or any other communication with reference to their taking possession of this car?

A. No sir—couldn't get any postal card.

Q. With reference to any telephone communication with the military with reference t the taking of this car, prior to its confiscatio can you tell us anything about that?

A. We had no telephone connection, not until the latter part of the first week in April.

Q. Was there any means of telephoning from your office at that time prior to the first week in April?

A. No, sir; we had to put in service an automobile for messenger work."

And Mr. Groves, bearing upon the same question, testified (Pr. Rec., 161):

"Q. I will ask you if—ever called upon the military authorities at Dayton to take possession of this car of poultry belonging to the Collins Produce Company and take it out of the possession of the Cincinnati, Hamilton and Dayton Railroad Company?

A. No, sir, I don't remember of ever having any communication whatever in reference to that car of poultry.

Q. Did you ever write to the military authorities or speak to them about that subject?

A. I didn't write to them about it—I had no stationery or anything to write on—everything was destroyed.

Q. If you remember, when was telephone connection again restored in your office?

A. It was not restored in my office proper until after the first of May—along about the first of May.

Q. When did you first have means, after this high water or floor, of telephoning?

A. We had some temporary phones upstairs —I think it was along about the latter part of the first week in April, after the flood—I think that is when it was."

Quoted above is all the evidence contained in the record relating to the matter of written or verbal communication by any one purporting to be an agent of the connecting carrier, with the military authorities or any one connected therewith, so far as we have been able, on a search of the record, to find.

We have set forth this testimony here and contend that it conclusively discloses that there was a total want of any evidence establishing the relation of principal and agent between the person writing the postal card and the persons calling by telephone the military authorities. It appears here that Col. Vollrath could not remember the name of the person who wrote the postal card, nor could he remember the position which said person purported to occupy. It further appears that the person representing himself to be the agent, in each and every instance originated the telephone call—called the military authorities. The military authorities did not, in any instance, call by phone the office of the connecting carrier or any agent or officer of said carrier.

The witnesses testifying to the telephone communication—none of them—knew the voice of the person talking, had any knowledge of such person having any connection with the railway company, and the only way such witnesses had of determining whether or not such person was an agent of the connecting carrier was from what the person calling said on the subject. The law is that before the declaration, statements or admissions received over a telephone, as the same were alleged to have been received in this case, *can be evidence,* the witness or person who received the communication by telephone must be able to testify that he knew and recog-

nized the voice of the man talking, and this is especially true where the alleged agent himself called the witness by telephone as here. Vol. 12 Cyc., p. 423; *Overman Brewing Co.* v. *Adams,* 35 Ill. App. 540; *Kimbark* v. *Ill. Car Equipment Co.,* 103 Ill. App. 632. As a matter of law, it is an indispensable requisite to the admission of the declarations of an agent as a part of the *res gestae* that such agency or authority be first proved. Jones on Evidence, 2d Ed., par. 356, p. 450. Such agency cannot be proved by the declarations themselves, no matter how publicly made, nor by such declarations accompanied by acts purporting to be in behalf of the principal unless they are brought to his knowledge. Jones on Evidence, *supra.* A relation of agency sufficient to admit the statement offered must first be established by affirmative evidence direct or inferential, dehors the declaration of the agent. Vol. 16, Cyc., 1065-6.

As a matter of law, we submit to this court that there being no proof of agency, the United States District Court erred in overruling and denying the motion made at the close of the evidence in the case to direct a verdict in favor of the plaintiff in error and in entering judgment upon the verdict, and that the United States Circuit Court of Appeals committed like error in not reversing the judgment of the United States District Court herein.

The Circuit Court of Appeals in its opinion (Pr. Rec., 227) says:

> "The objection that the evidence was incompetent and mere hearsay is untenable for the reason that the defendant read in evidence the depositions containing the statements now complained of * * * Objection is also made because the testimony failed to show the state-

ments were made by any one authorized to speak for the defendant. The difficulty with this objection is that the testimony complained of was received without objection. Witness stated that either he superintendent or the assistant superintendent made the request of Gen. Wood that the car of chickens be confiscated. If the party who thus made the request was either the superintendent or assistant superintendent of the division, there can be no question but that agency as well as authority was inferable."

The Circuit Court of Appeals misconceived our position and contention on the point in question. We could not, of course, question the admissibility of incompetent evidence which we introduced. The plaintiff in error is not questioning the legal proposition that a party reading the deposition of a witness is bound by the testimony of such witness. Our contention is that the fact that plaintiff in error read the deposition of certain witnesses taken by and on behalf of the defendant in error *does not add to or extend the probative force of such testimony;* that it proves no more if read bv one party than it would prove if read by the other party; that if the defendant in error had read the depositions in question, upon the issue of agency, without objection on the part of plaintiff in error, the statement therein contained would have been no evidence of the existence of the relation of principal and agent, between the persons writing the postal card and communicating by telephone with the military authorities, and the C. H. & D. R. R., the connecting carrier; this for the reason that with the depositions in evidence, there is still no evidence in the record tending to establish the agency, and the state of the case was such that without the agency proven, a verdict should have

been directed in favor of plaintiff in error. It cannot be the law that if the depositions had been read by the defendant in error, without objection, that a verdict should have been directed for want of evidence establishing an essential element necessary to warrant recovery in favor of defendant in error, nevertheless, when the depositions are read by plaintiff in error, same furnishes evidence establishing such essential element.

The Circuit Court of Appeals, in its opinion, refers to objection "made because the testimony failed to show that the statements were made by any one authorized to speak for the defendant," and in disposing of this objection the court says that "the difficulty with the objection is that the testimony complained of was received without objection." As we have above stated, the fact that the testimony was received without objection does not add to the probative force of the statements made by the witness, and herein the Circuit Court of Appeals is in error, in that it failed to give consideration to the real question of law. The law is that the carrier here was not responsible for the acts and declarations of an individual until there was produced evidence establishing the authority of such individual to act as its agent. *United States* v. *Boyd,* 5th Howard, p. 29. The testimony of the witnesses in the depositions, given its most extended weight, can be said to do no more than set forth the statements of a supposed agent, and the law is that before such statements could be evidence there must be added to them proof of the existence of such agency. Vol. 31, Cyc. p. 1652. Here it appears clearly that the witnesses had no acquaintance with the individual; did not even see

him, did not know and could not recognize his voice in the conversation over the telephone, and the law is that before statements received over a telephone can be evidence, the witness or person who received the communication by telephone must be able to testify that he knew and recognized the voice of the man talking, and in addition, we may add that it appears here that the person supposed to be the agent called the witness by telephone, and this adds strength to our position. Vol. 12, Cyc. p. 423. General Wood, one of the witnesses, as disclosed by his testimony, never at any time had any conversation with any one who purported to be an agent of the carrier. The statement contained in his deposition amounts to no more than that some subordinate in his office reported to him that some supposed agent of the carrier had made statements. We submit that in this record there is contained no evidence of the existence of the relation of agency between the carrier and the person writing the card and the person communicating by telephone, and that the District Court erred in refusing to direct a verdict at the close of all the evidence and that the United States Circuit Court of Appeals erred in sustaining the judgment of the United States District Court.

## VI.

The District Court charged the jury, at the request of the plaintiff in error that if they believed from the evidence that the seizure of this poultry by the military authorities was solicited, requested or advised, or in any wise brought about by the representative of the plaintiff, the care-taker in charge of

the car, that then and in that case the defendant in this case would not be liable. (Pr. Rec., 205.)

We respectfully contend that the law is that if the representative of the defendant in error, by his act instigated action of the military authority in the matter of confiscating the shipment, that such would defeat any right of recovery on the part of the defendant in error account the loss of such shipment.

In connection with what we have said above as to there being no evidence establishing agency, we at this point call the attention of the court to the action of defendant in error, through its representative, the care-taker. The evidence upon this point is not voluminous.

Major Smith testified as follows upon the question of care-taker advising confiscation (Pr. Rec., 85-87):

> "I was present when the chicken man in company of Lieut. Beverstock called on Colonel Vollrath and asked him to take the chickens off his hands; he was out of feed and if he did not do that the chances were that the majority of them would die; that the next day after this conversation Lieut. Beverstock came over and informed us that the chickens were dying, some of them, and that we had better take them off the man's hands. A day or two after that the commissary again reported that this chicken man was on his trail and that at that time Colonel Vollrath called up General Wood and asked him what to do with the chickens, and he puts the situation before him just as it was. What General Wood told him I do not know, but I was present when he called up and I know the very next morning he said to issue those chickens in lieu of meat."

There is in the record no denial of the statement of this witness. Lieutenant Beverstock states (Pr. Rec., 193-195, incl.) that he was instructed to investi-

gate the condition of the car of poultry and to report to Colonel Vollrath, and that he investigated the car and advised confiscation; that he went to the car in question and found that the man in charge of the car was out of feed; that the poultry in the car was dying and that if it would ever be of any service to any one it would be necessary to use this poultry soon after the investigation; that after he made report to the Colonel, the Colonel ordered him to confiscate the car, which he did at once, and the same was distributed among the people; that in making his investigation (Pr. Rec., 195) he saw the man who was caretaker of the car, and that this man told him he was out of money and could not find any more feed for the poultry.

The caretaker, Shipley, does not deny that he made the statements testified to by Major Smith. At page 200 printed record, this witness testified:

"Q. It has been intimated by some deposition that you had abandoned this car of poultry. I will ask you whether or not, prior to the time the military took charge of this car of poultry you abandoned it at any time?

A. No, sir, I never.

Q. Did you make any statement to anybody about you intending to abandon it?

A. None that I remember of."

And again, (Pr. Rec., 201):

"Q. I believe a witness by the name of Smith said you said to him that you wanted the militia to take the car—you wanted to turn it over to him. I will ask you if you made that statement?

A. I never made that statement that I can call to mind.

Q. Another witness stated that you said you didn't have any money to buy any feed—what do you say about that?

A. I don't remember of making that remark at all.
Q. Did you have money?
A. Yes."

This, so far as our examination of the record discloses, is all the evidence therein contained bearing upon the question of the caretaker's requesting the confiscation of the poultry, and we submit that this evidence establishes that the caretaker solicited the confiscation of this shipment and that the law applicable to the state of facts presented on this issue is such as entitled the plaintiff in error to have a verdict directed in its favor, for the reason that the defendant in error solicited the confiscation, and hence was not entitled to recover against the plaintiff in error account loss so occasioned.

## VII.

We contend that the District Court erred in admitting in evidence upon the trial of the cause defendant in error's Exhibit "D" (Pr. Rec., 46), and the Circuit Court of Appeals, in sustaining and affirming the decision of the District Court.

This evidence was upon the issue of damages.

The bill of lading provides (Pr. Rec., 40):

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment, under this bill of lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classifications and tariffs upon which the rate is based, in any of which events such lower value shall be

the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

Desiring that our position as to the error assigned on the admission of defendant in error's "Exhibit D" be clearly presented to the court, we here set out all the evidence contained in the record upon the issue of amount of damages, as follows (Pr. Rec., 45-49, incl.):

"Q. State if you received the letter you have in your hand in due course of business?

A. Yes, sir, it is a confirmation of the sale of this car of poultry.

Mr. Gilbert: We offer in evidence the letter which has just been identified by the witness.

Mr. Whitnel: We object to it—this seems to be a letter written by C. E. Barker to Charles Collins Company in New York City.

Q. This letter addressed to the Charles Collins Company at Jay and West streets, New York, I will ask you whether or not the Charles Collins Company were your agents in New York for this car of poultry.

A. Yes, sir, they are connected with our firm—they are our New York representatives.

Mr. Gilbert: We renew our offer.

The Court: The object of this letter, I suppose, is to prove the value of the property—I don't know that anybody identified this as being a contract—perhaps that will be done later, I don't know—I don't know that the witness stated this was the letter of Barker & Company.

The Witness: I did state that this is a confirmation of sale.

The Court: You know it is their letter?

The Witness: Yes.

The Court: Of course, if he knows that, it becomes a contract—it is a contract to pay what they say they will pay, so much a pound for these fowl—I think that is competent.

Mr. Whitnel: We except."

The letter is admitted in evidence and marked Plaintiff's Exhibit D and read to the jury, in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT D.

C. E. Barker & Co.,
Wholesale Commission Merchants,
Dealers in Country Produce of Every Kind and Variety,
38 Commerce St.
Newark, N. J., March 20, 1913.

*Chas. Collins Co.,*
*Jay & West St., New York.*

GENTLEMEN:

As per telephone conversation we hereby confirm sale of L. P. T. Car #739 at the following prices delivered Newark, N. J. Fowl and chickens 20c., roosters 14c., ducks 22c., and geese 14c. Car to be shipped out not later than March 22nd, 1913.

Yours truly,
(Signed) C. E. BARKER & Co.

Mr. Whitnel: I desire to call the court's attention in this connection to the bill of lading—this letter seems to be a statement of the price to be paid in New Jersey—the contract or bill of lading provides that the price of the property at the place it was received, Cypress, would govern, and not the price in New Jersey.

The Court: The bill of lading states that 'any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property, being the *bona fide* invoice price, if any, to the consignee and then proceeds 'at the place and time of shipment'—I think, of course, this evidence ought to be supplemented to show what the value was at the place and time of shipment—this has two meanings, and I don't know which is controlling—they are objecting to it because there is no evidence that the invoice price—I take it that is what is specified in the letter—was the value of the property

at the time and place of shipment—if he knows, he may state that—that would obviate the objection.

Q. If you know, Mr. Begg, you may state the value of the property at the time and place of shipment—were you acquainted with the market values?

A. Yes, sir, I was, but this car was sold on delivered basis to these people in Newark—unless we made or unless the car was delivered to them—the sale was made on the basis of delivering the car.

Mr. Dick: I object to that answer—it is not responsive.

The Court: Yes—if he knows the value of this stuff at the time and place of shipment, that is what he was asked to state.

A. I can't tell it off handed—there was so much put in at different points that it would be a hard matter to determine or pro rate the cost at the shipping point.

Q. Do you know the fair market value of the car of poultry at the time of shipment, with the freight prepaid for shipment to New Jersey?

Mr. Whitnel: We object to that.

The Court: The bill of lading refers to the invoice price and the price in the letter meets that—then it again refers to the time and place of shipment—I don't know, but it seems to me that it would be worth the invoice price—if it would be worth that at the time and place of shipment, that would almost necessarily follow, but they are making an objection here which I am trying to obviate so as to comply with the terms of that bill of lading.

Q. I will ask you, Mr. Begg, to state whether or not the value of this car was as invoiced—the value at the time and place of the shipment of the produce.

Mr. Dick: We object to that.

The Court: If this witness has an opinion as to the value of this property at the time and place of shipment, let him state it.

A. The poultry was worth just the price it was sold for, providing the freight charges were prepaid—the poultry was worth the price it was sold at, provided the Railroad Company delivered it.

Q. And the freight charges were prepaid?

A. The freight charges were prepaid, $190.40.

Q. I will ask you if you received the document which I hand you from the Chicago & Eastern Illinois Railroad Company.

A. Yes.

Mr. Gilbert: I wish to offer in evidence from the file just identified paragraph 42 on page 8 and item 10 on page 3.

Mr. Dick: We object to that—there is no way of telling from this document whether or not it was in force at that time—the right way to prove a tariff is to prove it under the certificate of the Interstate Commerce Commission.

Q. I will ask you, Mr. Begg, if you gave notice to the Railroad Company of this loss.

A. Yes.

Q. I will ask you to examine this paper.

A. This claim was made against them on July 21st and receipted by their agent.

Mr. Gilbert: We wish to offer the paper just identified by the witness.

Mr. Dick: We object to it as a self serving admission of plaintiff.

*Cross-Examination by Mr. Whitnel.*

Q. Are you acquainted with the market value of a car of poultry at Cypress, Illinois, and Mount Vernon, Illinois, on the 21st day of March, 1913?

Mr. Gilbert: I object to that—that is no criterion for its valuation.

The Court: I don't know that it is—it is cross-examination, perhaps—he said the freight being paid on that car, it was worth at the time what it was sold for—that is common sense—still, he may answer that question.

A. It was worth 20 cents a pound.

Q. Hens were on that day at that place?

A. Loaded in the car with the freight prepaid.

Q. What was the market price paid at Mount Vernon and at Cypress on that day?

Mr. Gilbert: We object to that -that does not include the element of handling and preparing for shipment.

The Court: It is perhaps cross-examination to show his knowledge of the business, but as I stated before, the witness stated, and I think that is a matter of inference, that the property, after they had sold it for what the letter stated and paid the freight on it, as they say they did, was worth at the time and place of shipment just what they say they sold it for—there isn't any question about that.

A. It was worth 20 cents loaded in the car.

Q. Was that being paid for hens at Cypress —was that the market price paid for fowls there at Cypress?

A. I don't think that enters into the case.

Q. Just answer the question.

A. I don't remember just what we paid at the time.

Q. Do you know at Mount Vernon on the 22d of March?

A. I can't tell you positively—I would not want to make the assertion.

Q. Isn't it true that the market price at Mount Vernon on that day was 12½ cents a pound?

A. I don't remember.

Q. Do you know or do you recall that the market price at Cypress on the day in question was 12½ cents a pound?

A. I don't remember."

Immediately following this (Pr. Rec., 49-51, incl.) the defendant in error offered in evidence a paper purporting to be claim presented by it to plaintiff in error, pursuant to requirement of bill of lading.

We here present record in full touching said claim as follows:

"Mr. Whitnel: We object to the introduction of this letter of the Collins Produce Company—this letter that purports to be in the form of a claim.

The Court: This letter seems to be a summary of everything you have proved here by other witnesses in the case—in other words, it is a letter or statement of claim addressed to the defendant—as I understand it, it comes within the class of self-serving documents and is wholly unnecessary, because if you have proved anything in this case by your witnesses, you have proved what is contained in that letter.

Mr. Gilbert: The bill of lading states that the claim must be filed in writing.

The Court: The bill of lading says 'Claims must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, etc.' I think he may prove it for that purpose—the contract calls for it—he may prove that he made a claim.

Mr. Dick: The defendant excepts to this ruling."

The document is admitted in evidence and marked Plaintiff's Exhibit E, and read to the jury, in words and figures as follows:

PLAINTIFF'S EXHIBIT E.

Collins Produce Company,
Incorporated,
Wholesale Lealers in Poultry, Butter, Eggs, etc.
General Offices: General Manager,
Mt. Vernon, Ill. J. Cyril Begg.

Mount Vernon, Illinois, July 21, 1913.

Claim of Collins Produce Company of Mount Vernon, Ill. against the C. & E. I. Railroad Company, Mr. W. C. Ellison, Agent, Mount Vernon, Illinois and William J. Jackson and Edwin W.

Winter of the C. & E. I. Railroad Company as Receivers of the said Railroad Company.

GENTLEMEN:

On March 21, 1913, the Collins Produce Company shipped from Cypress, Illinois, L. P. T. Car 739, consigned to C. E. Barker and Co., destination, Newark, New Jersey, containing live poultry as follows:

| | | | |
|---|---|---|---|
| Fowls ..... | 19268# | at 20c | $3,853.60 |
| Cocks ..... | 1368 | 14c | 191.52 |
| Chickens ..... | 1139 | 20c | 227.80 |
| Ducks ..... | 273 | 22c | 60.06 |
| Geese ..... | 206 | 14c | 28.84 |
| Turkeys ..... | 227 | 20c | 45.40 |
| | | | $4,407.22 |

This car has not been delivered to Barker & Company and by agreement we were to deliver this poultry in Newark, New Jersey. The agreement in relation hereto with Barker & Company was on April 21, 1913, cancelled by Barker & Company on account of non-delivery.

We therefore make this claim for the value of such poultry, viz: $4,407.22, and respectfully request the prompt payment thereof.

Yours truly,
COLLINS PRODUCE COMPANY,
J. CYRIL BEGG, *Vice-Pres.*

Received of Collins Produce Company a copy of the above and foregoing claim this, the 21st day of July, 1913.

W. C. ELLISON,
*Agt. C. & E. I. R. R. Co. and as Agent of W. J. Jackson and E. W. Winter, as Receivers.*"

In its opinion the Circuit Court of Appeals (Pr. Rec., 227) says:

"Complaint is also made because the court admitted in evidence a claim presented to the defendant by the plaintiff and which contained a statement of the number of pounds of poultry as

> well as the price at which the poultry was sold at Newark, New Jersey. The evidence was properly received, not to establish price, but to show the plaintiff presented its claim to the carrier prior to the commencement of the action, and pursuant to the provisions of the bill of lading. It was not offered or received for any other purpose, and value was established by other evidence."

There is no other evidence in the record bearing upon the value than above set out. We maintain that there was no proof tending to establish the invoice price, or market value at the time and place of shipment. The witness stated that the car was sold on delivered basis to the people in Newark. He stated that the poultry was worth the price it was sold for provided the freight was prepaid, but said he did not remember the price paid for same at place of shipment. The District Court expressed the view that the poultry was worth at the time and place of shipment just what they had sold it for if freight was prepaid. This is in direct conflict with the provisions of the bill of lading where the freight is prepaid the contract provides that the measure of recovery shall be the value, the invoice price, which means the price paid at the place of shipment, plus the amount prepaid as freight.

The letter (Defendant in Error's "Exhibit D") written by C. E. Barker & Co. at Newark New Jersey, to Chas. Collins Co., New York, does not purport to refer to the invoice price of this poultry at the time or place of shipment, but to the sale price delivered at Newark, New Jersey, and we submit that there is nothing in the record tending to establish any other price. The purpose of the provision fixing basis of

recovery in case of loss of shipment, was to prevent the recovery of profits, or gain by speculation in such case. This object was thwarted and defeated in this instance by the error committed in the introduction of this evidence. While, as we contend, there was no proof of the invoice price at the time and place of shipment, pursuant to the provisions of the shipping contract, still if the record contained such it would not cure the harmful error committed in admitting Defendant in Error's "Exhibit D."

---

While the District Court admitted Defendant in Error's "Exhibit E" upon the theory that it was proper as establishing that claim had been presented as required by the provisions of the bill of lading, still this paper, it will be noted, sets out the "sale price" as contained in the letter "Exhibit D" above. The claim was not made on the basis of invoice price at time and place of shipment, but on such sale price, and the amount of the verdict and judgment conforms to the amount of the claim plus interest. In no view can it be said that Defendant in Error's "Exhibit D" above was admissible as establishing merely that claim was presented. Indeed it is clear that the District Court admitted it as evidence on the question of value. There is no evidence in the record of, and no contention made that the carrier had notice of special contract of sale at specified price at place of delivery, and in the absence of such notice to the carrier, it cannot be held for such sale value. Vol. 6 Cyc. page 450. Nor will the absence of an invoice prevent the operation of stipulation in carriage contract limiting the liability to the in-

voice price at point of shipment; in such case the market value at that point governs. *Pierce* v. *Southern Pacific Co.*, 40 L. R. A. (Old Series) 350. It is proper and legal for the carrier to contract as to the measure of its liability in case of loss of the shipment. *Adams Expr. Co.* v. *Croninger,* 226 U. S. 491; 57 L. Ed. 314. Vol. 6 Cyc. 401.

The District Court erred in the admission of Defendant in Error's "Exhibit D" and such error was harmful to plaintiff in error.

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In conclusion, for the errors assigned and herein presented and argued, the plaintiff in error contends that the judgment of the United States District Court rendered against it, and the judgment of the United States Circuit Court of Appeals affirming same should be reversed.

Respectfully submitted,

HOMER T. DICK,
LINDORF O. WHITNEL,
*Counsel for Plaintiff in Error.*

# REPLY BRIEF

-13-

FILED
JAN 13 1919
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No. [redacted]138

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,
*Plaintiff in Error,*

vs.

COLLINS PRODUCE COMPANY,
*Defendant in Error.*

In Error to the United States Circuit Court of Appeals, Seventh Circuit.

## REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

HOMER T. DICK,
LINDORF O. WHITNEL,
COUNSEL FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1916.

No. 949.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,
*Plaintiff in Error,*
vs.
COLLINS PRODUCE COMPANY,
*Defendant in Error.*

In Error to the United States Circuit Court of Appeals, Seventh Circuit.

## REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR

### I.

MAY IT PLEASE THE COURT:

While plaintiff in error is content to rest its cause here upon its original brief as to dominant questions of law involved, nevertheless, it deems it important, and its duty, to render further assistance to the court, by calling attention to errors, mistakes, and misstatements which appear in the statement, brief and argument of the defendant in error and which if unexplained might prove misleading.

II.

Defendant in error contends that, "That this is not an action to recover for any violation of the Act to Regulate Commerce" (Brief of Defendant in Error, p. 3) and that "The declaration sought to recover for a failure to discharge the duties imposed by the common law upon the carrier; the right of the shipper to recover in this cause rests upon the common law." (Page 4 Brief of Defendant in Error.)

The declaration set out, at pages 5 and 6 printed record, refutes the contention of the defendant in error, that this cause is not based upon the 20th Section of the Act to Regulate Commerce.

It is there alleged that the plaintiff in error is a common carrier, amenable to the Interstate Commerce Act, and bound by the Act, and particularly by Section 20, which section is set out and made the gist of the declaration. By its declaration, the defendant in error counts alone upon its right to recover against plaintiff in error by virtue of the "Carmack Amendment," to said 20th section, and seeks to bind plaintiff in error upon the ground that as initial carrier it issued its bill of lading or receipt and that defendant in error is the lawful holder of the same.

Testing the question of whether or not the suit here is based upon the Carmack Amendment, we must consider the averments in the declaration, essential to be proven in order to make out the case of defendant in error as set up in his declaration. It alleges that plaintiff in error was engaged in in-

terstate commerce. The declaration avers that the plaintiff in error is an Illinois corporation, that its line of railroad extends in and through Jefferson County, Illinois; that it was amenable to the laws relating to interstate commerce and bound by the Carmack Amendment, and sets forth in *haec verba* the section providing for the issuing of receipt or bill of lading and for action thereon against the initial carrier where loss occurs on the line of connecting carrier.

It was essential for the defendant in error to establish the issuing of the bill of lading here, and that it was the lawful holder thereof, as one of the essential elements of the case alleged in the declaration. Without this proof defendant in error could not have claimed to have made out a *prima facie* case under this declaration.

The defendant in error says, "The bill of lading in this case is a contract for through transportation." The bill of lading by its terms routes the shipment —C. & E. I. and B. & O., clearly providing for connecting carrier and disclosing that initial carrier will not handle to destination and moreover the bill of lading provides that "No carrier shall be liable for loss, damage or injury not occurring on its own road, or its portion of the through route, * * * except as such liability is or may be imposed by law." At the time this shipment was made there was no law except the Carmack Amendment which in effect prohibits a carrier from limiting its liability to loss which occurs on its own line. The bill of lading here, which the defendant in error says is a contract, limits the liability of plaintiff in error to loss on its own line, except where otherwise provided by law.

The alleged loss here occasioned by martial law confiscation and the flood, it is admitted did not occur on the line or road of the plaintiff in error, the initial carrier. If, therefore, the suit is not based on the Carmack Amendment, but rests on the contract alone, then there could be no recovery against plaintiff in error. That is, but for the Carmack Amendment, the defendant in error would have no standing. If we eliminate the averments in the declaration, grounded on the 20th section of the Act to Regulate Commerce, then it fails to state a case. If the Carmack Amendment did not exist as law, and this suit was based on the contract, the bill of lading, then on the uncontroverted fact that the loss claimed for did not occur on the line of plaintiff in error, the defendant in error would be barred of recovery. It follows that the declaration of defendant in error rests upon the Carmack Amendment, and that upon that statute alone could defendant in error claim a right to recover.

## III.

It is not a question of seeking to relieve this initial carrier of its common law liability. At common law it had the right by contract to limit its liability to loss occurring on its own line.

The provision of the statute, the Carmack Amendment, put a limitation on this right of the initial carrier to contract by providing a right of action in favor of the lawful holder of a bill of lading covering an interstate shipment transported over the lines of connecting carriers against the initial carrier "for any loss, damage or injury to such property caused by it, or by any carrier * * * to which such prop-

erty may pass." This statute did not change the liability of the initial carrier for loss and damage occurring on its *own* line. It did require such carrier to issue a bill of lading or receipt for property received by it to be transported from a point in one state to a point in another state, but this alone would not change the liability of such carrier for loss on its own line. As stated by this court in the case of *C. N. O. & T. P. Ry.* v. *Rankin,* 241 U. S. 319, in discussing the case of *Adams Express Company* v. *Croninger,* 226 U. S. 491, "properly understood neither this nor any other of our opinions holds that this amendment has changed the common law doctrine heretofore approved by us in respect to the carrier's liability for loss occurring on its own line." As applied to a case where it is sought to render the initial carrier liable for loss occurring on the line of a connecting carrier, the words "Caused by it or by any connecting carrier" used in the Carmack Amendment, was construed in the Croninger case, *supra.* That case is in point here and we respectfully submit that in order for defendant in error to make out its case under its declaration here, it was not enough to show that shipment was delivered to initial carrier and had not been received by consignee. The Croninger case furnishes answer to the contention of defendant in error that the initial carrier is an absolute insurer.

## IV.

Counsel for defendant in error misconceives the position of plaintiff in error.

It seems to be the contention of defendant in error

that plaintiff in error is seeking to have this court pass upon a question of fact and determine the weight to be given testimony. To so contend is to misread and misstate the position of plaintiff in error.

There is in fact very little conflict in the evidence, in fact no serious or material conflict. The question is not where does the preponderance or weight of the evidence lie, but whether or not there is any competent evidence establishing very material and essential elements indispensible to warrant judgment against plaintiff in error here.

The District Court really submitted but one question of fact to the jury; that was the question of whether or not the agents of the C. H. & D. R. R., the connecting carrier, induced the military authorities to confiscate this shipment, as the District Court put it in his charge to the jury: "Whether from all this evidence you believe that this property was taken and seized by the military authorities by and on the invitation of the Cincinnati, Hamilton and Dayton Railroad or any of its authorized officers or agents."

The plaintiff in error had made its motion to direct verdict in its favor on the ground that the state of record presented was such as disclosed a failure on the part of defendant in error to make out such case as called for the decision of the jury on an issue of fact. The District Court disallowed this motion holding that there was the one issue of fact as above stated for the jury. Plaintiff in error contends that the court erred in not sustaining the motion to direct.

Of course, when there is an issue of fact, and

where there is controversy or conflict in the evidence bearing upon the issue, and the state of the evidence such as calls for a decision on the facts; and the state of the record such as a finding one way or the other would have that substantial support which would warrant the court in denying new trial, then this court would not be called upon to consider the evidence in the record for the purpose of determining where the weight or preponderance of the evidence was. Such is not this case. We have not made such contention here. Counsel for defendant in error misconstrue our contention when they infer that such is our position. We contend, as a legal proposition, that the District Court erred in holding upon this record that there was an issue of fact proper to be submitted to the jury. We contend that the District Court committed error in overruling motion to direct, and this calls for the decision of a legal question.

Counsel for defendant in error cite the case of *Hellick* v. *Searcy*, 278 Ill. 116, as stating rule governing the question of when the facts should go to jury. The Federal rule is different. This court in the case of *Elliott* v. *C., M. & St. P. Ry.*, 150 U. S. 245, held that when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict. To the same effect is the case of *Gunther* v. *L. L. & G. Ins. Co.*, 134 U. S. 110. Certainly when there is no evidence to support an essential and material element necessary to make out plaintiff's case it is error for the court to refuse to direct verdict.

The contention of the plaintiff in error here is: First, that even though one who, before the declaration of martial law, at Dayton, and the taking possession of railroad property by the military, was an agent of the C. H. & D. R. R., stated to some military officer that he thought it best to confiscate the shipment, or advised the military to confiscate, this would not be binding on the carrier; and, second, that in this record there is no proof of agency between the person giving such advice, if such was given, and the railway company. That is, that the record contains no proof of agency and that agency will not be presumed. These are questions of law. First: What is the status of persons who prior to martial law were agents of the carrier after the railroad equipment and shipment thereon of the carrier has passed to and is under the exclusive control of the military and subject to the order of the commander. Second: In this case was there introduced in this record any legal evidence to establish agency between the connecting carrier and persons whom it is alleged wrote to or talked to the military; and, third: does there exist a rule of law whereby the *probative force* or proving quality of testimony is different if offered by one party to what it would have been if offered on behalf of the other party. Such questions are not for the jury; they are for the court. All these questions arose on the motion to direct, and we maintain that in the decision thereof the District Court committed reversible error in refusing motion to direct, and likewise the Circuit Court of Appeals erred in affirming the judgment of the District Court. In our original brief, we quoted from the record all the evidence bearing upon these questions for the

purpose of assisting this court in determining whether or not the courts below erred in denying motion to direct, and not as counsel for defendant in error seem to infer for the purpose of having this court pass upon a jury issue.

## V.

In the effort to present an issue of fact proper to be determined by the jury, counsel for defendant in error we submit have done violence to the record here; unintentionally, no doubt, many misstatements and over-statements as to the facts shown upon the trial, have found their way into the brief of opposing counsel.

In the endeavor to meet or controvert our contention that where martial law prevails and the possession of shipments and the possession and operation taken away from the carrier and exclusive control assumed by the military power those who were before agents of the carrier, by statements, cannot bind the carrier, counsel for defendant in error say, at page 9 of brief:

> "The militia did not operate or in any way take charge of or control the railroad, the agents of the railroad had charge as usual, in the downtown district the militia furnished police protection for property, but this car was far out and was not even provided with police protection and remained in the complete possession and control of the railroad until it delivered it to the militia at Leo street in Dayton where caretaker Shipley was relieved."

Here counsel in effect state that martial law did not extend to the point or place where this car was

located and that the military authorities neither assumed nor exercised control over the shipments. Counsel refers to no page of the printed record where evidence supporting this statement will be found. There is no such evidence in this record. The statement is a voluntary contribution by counsel. THE UNCONTRADICTED direct evidence on this subject is that of J. J. Corcoran, who was before the flood, superintendent of the connecting carrier. His evidence will be found at page 158 of the printed record and it will be found that the testimony of all the officers of the militia, including the commander, is to the effect that the military authorities had ousted the civil authorities and exercised exclusive control and management of all the railroad property in the zone and that no civilian was permitted to do any act or thing in connection with the handling of shipments. That martial law prevailed and the power and authority thereunder exercised by the militia was complete and to the exclusion of the owners of such property and all agents of such owners.

Zealously combating our contention that there was no evidence in the record that an authorized agent, with power to act for the carrier had advised or induced the militia to confiscate this shipment, opposing counsel in their brief make many statements which are unsupported by the record. We call attention to page 9, where it is said:

> "Colonel Vollrath stated that he was prompted in his action by what now appears to be incorrect representations made by the agents of the connecting carrier and their recommendations for the confiscation."

Colonel Vollrath, when his statements are analyzed, did not say that he had ever talked to an

agent of the connecting carrier, nor did General Woods have any conversation or any correspondence with any person who was an agent of the connecting carrier. General Woods does say, at page 168 of the record, as stated by opposing counsel, that:

> "The practical agreement of the statements made by Colonel Vollrath and whoever telephoned from the C. H. & D. office governed my conduct."

However, General Woods did not purport to have talked to any agent of the connecting carrier. His information was received from subordinates, one of whom was Colonel Vollrath. An analysis of the testimony of Colonel Vollrath discloses that some person wrote to him on a postal card and that some one called him by telephone, the name of the person he could not recollect, but his recollection was that it was the superintendent or assistant superintendent, his information coming from the person who called, with whom he had no acquaintance and whose voice he did not know; that he received a postal card purporting to come from some official of the C. H. & D. Ry., whose name he could not recall, but his recollection was that he purported to be superintendent or assistant superintendent, but there is no statement on the part of Colonel Vollrath or any other witness that amounts to more than that some person, claiming to be an agent of the connecting carrier, called up and talked by telephone and one person wrote a postal card. The card itself was not produced and the witness' recollection of the contents of the writing is that it called attention to the car of poultry and urged that he give it his attention. Such statement could not amount to a recommendation that

the car be confiscated, even though it could be said that it was written by an agent of the connecting carrier. Again the conversation between this witness and the person who called by telephone amounted to no more than the statement made in writing on the card. We repeat there was no evidence whatever to show that any such person was an agent of the connecting carrier and the statement found at page 8 of the brief of counsel for defendant in error is that:

> "By and through these representations and suggestions emanating from the agents of the connecting carrier General Woods was influenced and induced to take charge of the car through Colonel Vollrath on March 31st."

This is a conclusion only and not a statement of fact as disclosed by this record and the statement on the same page made by counsel:

> "Mr. Corcoran or his assistant both by card and by telephone requested Colonel Vollrath to take possession of the car,"

is not supported by this record. It is a conclusion of counsel for defendant in error. Nowhere in the record is there any proof that Corcoran or his assistant made any such statements to the militia. The testimony of Corcoran, who was superintendent prior to the flood, and of Groves, who was agent at the same time, is to the effect that they were ousted of all power and authority. The superintendent says that he was not permitted to go upon the tracks without a military pass, and both of these witnesses state that they never, at any time, in writing, or by telephone, suggested or advised the military authorities to confiscate this shipment.

We respectfully maintain that there is no evidence

in this record which tends to establish the relation of principal and agent between the connecting carrier and the person who wrote the postal card to Colonel Vollrath or person or persons who, by telephone, communicated with the military officers. This true, we maintain that there can be no recovery against the initial carrier and that the motion to direct should have been sustained. In original brief we cited authorities upon which we rely in support of contention and deem it unnecessary to repeat same.

VI.

It is urged by opposing counsel that while it was not disputed that martial law was proclaimed, still it is not conceded that any corporation surrendered legal rights. It seems to be the contention of counsel that notwithstanding the existence of martial rule, still the carrier had control and management of the shipment. It is said on page 10 of the brief of defendant in error:

> "And while it is not disputed that the Governor proclamed martial law and that the militia went to Dayton by his directions, it was not and is not conceded that in so doing any individual or corporation surrendered a single legal right or that the presence of such militia created legal anarchy whereby all contractual or legal rights were destroyed and nullified, thereby giving to the railroad as is claimed by the defendant here, the right to send forth its agents and request and invite the seizure of any and all the shipments in the possession of the railroad without in any way incurring a liability to the shipper."

Here again counsel misstate the position of plaintiff in error. Again counsel abandon the record and indulge in unwarranted conclusion.

Martial law does not mean a state of anarchy is to be produced. Such law is invoked to prevent anarchy, to preserve order, to prevent suffering, to better conditions produced by calamity, or by lawlessness. In the instant case a grievous calamity, occasioned by an act of God, had visited a thriving city and many lives and millions of property had suddenly been taken and destroyed and an emergency existed which threatened the loss of thousands of lives of citizens through exposure to flood, cold and starvation. Grewsome crime was threatened by vandals and the Governor acting under the Constitution acted to save, not to destroy. Civil authorities, acting under civil law, were powerless, unable to protect, or to preserve life; unable to clothe the naked and freezing, or to feed the hungry and starving. The situation called for a stronger and more powerful remedy than that furnished by the civil law; for greater scope of action than could be exercised by the civil authorities. The Constitution and laws of the State of Ohio, provided for that power and that scope of action. The means was invoked and prevailed. It was law, not anarchy; he who acted as commander directed the enforcement of that law; he acted by authority of law. Carriers within the territory co-extensive with the domain of such commander's jurisdiction were powerless to oppose and for them to have done so, would have been a violation of law; to resist would be to ignore the authority of law. Such carriers after the shipments on their lines had passed to the exclusive possession and control of the military could not by agent exercise control or direction. Such carrier had no authority or power for such purpose. The decision of the cor-

poration in such case has no binding force. Its agents cannot speak for the corporation in opposition to the will of the commander, for the authority of the corporation to control is gone, he who was agent before has lost his power to control for the corporation. Agency created by authority of the civil law has ceased and a condition having arisen where the principal by authority of law cannot act for himself, he cannot act by his agent. If he cannot act by his agent with authority of law, how can it be said that one who was his agent before the law was invoked can act for him? The hand of the government reaches forth and applies the grasp of martial law where the milder rule of civil law cannot save or prevent; but the application of this stronger remedy is provided for by law, and proceedings under it are with authority of law.

In the bill of lading issued in this case, which defendant in error admits is a contract, and upon which it relies for a recovery, it is provided that the carrier shall not be liable for loss or damage to shipment caused by the act of God, the public enemy, quarantine or the authority of law.

## VII.

Defendant in error in its brief, on page 48, states:

> "The question of the agency of the persons who called Col. Vollrath and Gen. Wood on the telephone advising and requesting the seizure of the car of poultry cannot be considered under the state of the record because all the evidence on that subject was offered and placed in proof by the defendant."

In answer, first, the record does not show, and here-

tofore there has been no contention that anyone called Gen. Wood. Gen. Wood received all information through subordinates in his office. He was told that someone had called by telephone. Second, Col. Vollrath does not go to the extent of saying that anyone called him and advised or requested the seizure of the car. The car of poultry was not under carrier's control, but that of the military authorities when it is alleged the unidentified person called him by phone. Third, counsel for defendant in error are in error in contending that because the depositions taken by defendant in error were read in evidence by plaintiff in error, that this increases, adds to or extends the PROBATIVE FORCE of the statements contained in the depositions. The depositions prove no more if read by one party than if read by another. As is well said in the article on Evidence in 17 Cyc., at page 800,

> "Evidence intrinsically destitute of probative quality, acquires no new attribute in point of weight by its production in the case."

We are not questioning the admissibility of evidence, but we do insist that there is no evidence here which establishes agency between the party calling Col. Vollrath by phone and the connecting carrier, and that this being true, even upon the theory of the defendant in error, verdict should have been directed by the District Court. This question is fully presented in original brief of plaintiff in error and we will not burden the court by repeating here.

We are satisfied with our original brief upon the remaining questions involved and presented for decision in this case. We respectfully insist that the court erred in admitting in evidence defendant in

error's "Exhibit D" shown on page 46 of printed record and set forth in original brief at page 50, and also in admitting in evidence defendant in error's (Plaintiff's) "Exhibit E" set forth on pages 54 and 55 of the original brief. We have argued under Division 7 of original brief this error and there will be found a statement of our contention touching same, which error, in addition to others presented and argued in original brief, we rely upon for reversal.

Respectfully submitted,

HOMER T. DICK,
LINDORF O. WHITNEL,
*Counsel for Plaintiff in Error.*

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*IN THE*

# *SUPREME COURT*

## *of the UNITED STATES*

*OCTOBER TERM, A. D. 1918*

**No. 138**

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| THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY<br>Plaintiff in Error<br>vs.<br>COLLINS PRODUCE COMPANY<br>Defendant in Error | In Error to the United States Circuit Court of Appeals for the Seventh Circuit. |

## STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

### STATEMENT OF DEFENDANT IN ERROR.

Quoted from the charge of the Court to the jury, printed Record pages, 203-4:

> "The defendant is only liable in this case for the failure of the Cincinnati, Hamilton and Dayton Railroad to discharge the duties cast upon it by law. It was its duty, of course, to transport this property, if it could do so. It couldn't overcome the

flood—it couldn't overcome the action of the military authorities, if the military authorities acted of their own volition, and the only question in this case is a question of fact and a very simple one, and it is this: whether, from all this evidence, you believe that this property was taken and seized by the military authorities by and on the invitation of the Cincinnati, Hamilton and Dayton Railroad or any of its authorized officers and agents. That is the only question you have to decide in this case."

"If it was so taken and destroyed or lost and distributed by the military authorities at the invitation of that railroad then this defendant would be liable for that. That railroad had no right, had no authority to dispose of that property in this manner. It was its duty to have kept the property as long as it could, and if it could have been kept long enough to have transported it whenever the situation was such that transportation was feasible."

"So if you believe from the evidence in this case, all of the evidence in this case, that the military authorities seized this property solely and by reason of the invitation of the Cincinnati, Hamilton and Dayton Railroad Company and disposed of it, and if you further believe from the evidence, had that not been done, this property could have been in the exercise of ordinary care, shipped to its destination, or any portion of it, then the defendant would be liable for the value of the property, whatever it might be."

From the opinion of the United States Circuit Court of Appeals in this case, page 225 Printed Record:

"The trial court accepted the view most favorable to the defendant and concluded that martial law in its fullest sense was in fact declared, that the Governor of the state had full authority so to do and that he exercised his power in this case, and was amply justified in exercising such power, and that General Wood in charge of the military forces acted within the power delegated to him by the Governor."

"Accepting this view, the District Court concluded to rest the carrier's liability merely upon the action of the railroad officials leading up to the confiscation of the car of chickens. In view of this court's conclusion on this phase of the question and the law applicable thereto, it is not necessary to consider the effect, generally, upon a carrier's liability, of the declaration of martial law under the circumstances here disclosed."

"While the testimony on this issue was controverted, the district court was amply justified in submitting to the jury the question of whether the property was taken and seized by the military authorities by and upon the invitation of the carrier."

This is not an action to recover for any violation of the Act to Regulate Commerce, and while the declaration which consists of one count in assumpit sets forth by way of recital the Carmack Amendment and states that such law was in force and binding upon **the plaintiff in error, the initial carrier, herein called the defendant,** the declaration as may be seen by examination is a common law count and recovery is sought upon the averment that **defendant in error, herein called the plaintiff, at the request of the de-**

**fendant** at Cypress, Illinois, delivered certain goods and chattels, (live poultry), therein described, to be taken and safely carried by the defendant from that place to Newark, New Jersey, and at the latter place to deliver the same to C. E. Barker & Co. for the plaintiff. That the defendant then and there issued a through bill of lading therefor to the plaintiff, Collins Produce Co., and promised to safely carry the same to the last named place and there safely deliver the same to the consignee thereof, and that although a reasonable time for the carriage and delivery thereof had elapsed, yet the said initial carrier did not and would not, although often requested, at the last named place, deliver the same for said shipper, although the freight charges for the entire transportation were prepaid, but has wholly failed and neglected so to do, whereby such goods and chattels have been lost to the plaintiff, the present holder of the said bill of lading, the Collins Produce Company.

The declaration sought to recover for a failure to discharge the duties imposed by the common law upon the carrier; the right of the shipper to recover in this cause rests upon the common law.

The purpose of the Carmack Amendment was to combine 'Unity of responsibility with unity of transportation,' prohibiting the initial carrier, the defendant here, from relieving itself by any provision in a receipt or bill of lading, issued, of responsibility upon delivery to a connecting carrier; and, by the Act such duty as the initial carrier undertakes and owes to the shipper, continues in full force and effective until such delivery at

destination; the common law makes the initial carrier responsible for through transportation and the Carmack Amendment prevents the initial carrier from limiting its undertaking to transport over its own line, alone.

The bill of lading in this case is a contract for through transportation (Printed Record 39).

The defenses interposed are (a) the loss and damage was occasioned by act of God; (b) such loss and damage was occasioned by the combined act of God and the public authorities, (meaning the state militia) the shipper and connecting carrier both being prevented from obtaining feed for the poultry, and the same was taken, seized and distributed by the Ohio militia of its own volition, acting, uninfluenced by the officers and agents of the C. H. & D. Railroad Company, herein called the connecting carrier.

On the 21st day of March, 1913, the Collins Produce Company, the plaintiff, arranged with the defendant to ship a carload of live poultry from Cypress, Illinois, a point on the line of railroad of the defendant, to Newark, N. J. It was arranged whereby additional live poultry was to be loaded at Mt. Vernon, Illinois, and also at Vincennes, Indiana. The charges for freight and the privileges mentioned, for the transportation thereof to Newark, amounted to $190.40 and the same was prepaid at Cypress by the plaintiff. The car furnished at Cypress was L. P. T. car No. 739, consigned to C. E. Barker & Co., routed C. & E. I. and B. & O., a bill of lading was issued to and is now held by the plaintiff and appears at pp. 38-42 printed Record, and on its face contained

the words, "Stop at Mt. Vernon and Vincennes to finish loading."

The car was partly loaded at Cypress on March 21, 1913, by the agent of plaintiff at that place, W. A. Adams, and arrived at Mt. Vernon the following day, where additional poultry was loaded in this car by J. C. Begg, Vice President and General Manager of the plaintiff company.

At Mt. Vernon abundant feed was placed in the car and Thomas Shipley, a care taker of many years' experience there, placed in charge, and on arriving at Vincennes on March 23, 1913, the loading of the car was completed.

The car contained when the same left Vincennes, 19,268 pounds of hens, 1,368 pounds of cocks or roosters, 1,139 pounds of chickens, 273 pounds of ducks, 206 pounds of geese and 227 pounds of turkeys, besides two guineas, making a total of 22,481 pounds (Printed Record 44 and 45). C. E. Barker and Company had purchased this carload of poultry at the following prices delivered in Newark: Fowl and chickens, 20c; roosters, 14c; ducks, 22c; geese, 14c; car to be shipped out not later than March 22nd, to said consignee, and at the prices named in such sale the value of the shipment was $4,407.22 (claim Printed Record 50).

The Cincinnati, Hamilton and Dayton Railroad Company, herein called the connecting carrier, although a separate corporation, is a part of the B. & O. system, and L. P. T. car No. 739 reached Dayton, Ohio, enroute to Newark, on the line of this connecting carrier, at an

early hour on the morning of March 25, 1913, attended by care taker Shipley, who had no control over the movement of the car or disposition of the shipment, and whose sole duty was to feed and water the poultry. Because of the flood, the car was stopped on high ground in the outskirts of North Dayton. Nearby resided some farmers where feed might be obtained. Here the car was delayed until March 31. In order to make sure of the best attention and care, Shipley engaged W. C. Nies, who resided near the location of the car, on March 26, to assist him and also arranged for unloading the poultry in case it became necessary for its proper preservation (Printed Record, pp. 58-76 inclusive). Corn for the poultry was obtained by them from a Mr. Kammer, perhaps on two occasions, amounting to twenty-five bushels, and was paid for by Shipley, and so faithful were Shipley and Nies in the care and attention, feeding and watering the poultry twice each day, that when the connecting carrier moved the car down town to Leo street March 31 and there turned it over to the militia, only 21 chickens had died; and arrangements had been made by Shipley for additional feed as the same might from time to time be needed.

Col. Vollrath states in his testimony at page 151 of the Printed Record that Shipley remained in charge of the car, that he paid no particular attention to it because a man was in charge, until the same was turned over to the militia by the connecting carrier, and that he even gave Shipley a statement showing what had become of the car. Up to this time, the militia had nothing to do

with this car. In the meantime Shipley received from Mr. Groves the freight agent and Mr. Corcoran the Superintendent no assistance, no aid, but in lieu of help they called on him, separately, and advised and sought to persuade Shipley to turn the car over to the militia, testimony of Nies, Printed Record 62-63, and Shipley positively refused to do so, and on the contrary said, "he wanted these chickens to go to destination," testimony of Superintendent Corcoran (Printed Record 158-9).

Mr. Corcoran or his assistants, both by card and by telephone requested Col. Vollrath to take possession of the car (testimony of Col. Vollrath Pr. Rec. 150-3). The Colonel communicated their requests and the information received from them to General Wood. Agents of the connecting carrier also telephoned General Wood more than once making the same requests. In making these requests, both to Col. Vollrath and to Gen. Wood, for the seizure by the militia, the condition of the poultry was grossly misrepresented as having been deserted by the care taker and being in a dying condition.

By and through these representations and suggestions eminating from the agents of the connecting carrier, General Wood was influenced and induced to take charge of the car through Col. Vollarth on March 31.

Gen. Wood in his testimony at page 165 (Pr. Rec.) says, "I did not direct Colonel Vollrath to take possession of the car of poultry until after I received the communication from the railroad," and at page 168 he testified, "If it had not been for the report made by Colonel Vollrath, which was substantially confirmed by the

statements of the railroad company, I would not have taken or ordered taken the car load of poultry, for the reason that knowing in ordinary cases of confiscation the bill would have to be settled by some one, I would not have fed the flood sufferers poultry."

Colonel Vollrath stated that he was prompted in his action, by what now appears to be incorrect representations made by the agents of the connecting carrier, and their recommendations for the confiscation; and as finally influencing his action, General Wood says at page 168, (Pr. Rec.) "The practical agreement of the statements made to me by Colonel Vollrath and whoever telephoned from the C. H. & D. office governed my conduct."

The militia did not operate or in any way take charge of or control the railroad, the agents of the railroad had charge as usual, in the down town district the militia furnished police protection for property but this car was far out and was not even provided with police protection and remained in the complete possession and control of the railroad until it delivered it to the militia at Leo street in Dayton where care taker Shipley was relieved. The poultry was in good condition and had deteriorated but a trifle in the loss of but a few chickens.

It appeared from the evidence of Mr. Robison, an expert in handling live poultry, that the same could be kept in loaded cars indefinitely; he stated that he had known of such cases where the same came out in good condition at the end of twenty-one days after having been on the road twelve days. Freight traffic was

resumed for the movement of this car from Dayton east on April 8.

The statute of Ohio gives no authority to the militia to seize or distribute property; like other states, this body of men in Ohio is nothing more than its police officers, whose duties are the preservation of order and the protection of property; and while it was not disputed that the Governor proclaimed what is called martial law and that the militia went to Dayton by his directions, it was not and is not conceded that in so doing any individual or corporation surrendered a single legal right, or that the presence of such militia created legal anarchy whereby all contractual or legal rights were destroyed and nullified, thereby giving to a railroad as is claimed by the defendant here, the right to send forth its agents and request and invite the seizure of any and all the shipments in the possession of the railroad without in any way incurring a liability to the shipper. The plaintiff made out a prima facie case by showing non-delivery, value as invoiced to consignee at bona fide invoice price, possession of the bill of lading and having on July 21, 1913, made claim for loss. Thereupon, the burden of proof was cast upon the defendant initial carrier to establish its freedom from liability by a preponderance of the evidence and facts in proof, according to the rule of law in such cases and the terms of the bill of lading.

The plaintiff had taken the depositions of General Wood and a large number of witnesses in Ohio for use in rebuttal, but on the trial all such testimony was read to the jury on the part of the defendant by its counsel

and all the depositions taken for the defense were by the same counsel read to the jury, omitting and waiving necessarily any and all objections made by them to each question and answer shown to have been entered at the taking thereof; the plaintiff urges that in so doing the defendant invited the jury to believe in the truthfulness and reliability of such testimony.

Now it is said in defense that all such evidence is proofless to a jury and that the cause should be reversed because the jury considered the same together with all the other evidence; chiefly, the evidence in the case consisted of depositions (Printed Record pages 52-197), and the same were offered and used upon the trial on behalf of the defendant to show freedom from fault and to excuse failure to deliver.

While counsel for the defendant after having placed these depositions in proof, knowing as they did in advance the answer that was forthcoming to each question, now urge that this evidence was not proper or competent; their offer and use thereof precludes the consideration of the objection made.

No effort was made at the trial to defend under the expression in the bill of lading excusing the carrier where the loss is occasioned by 'Authority of law.'

'Authority of law' as used in the bill of lading, we submit, means the right and authority accomplished by a writ issued upon the judgment or order of court, such as a writ of execution, writ of attachment or other like due process of law.

It is not conceivable that such expression was intend-

ed to and did include what some are pleased to call 'Martial law' which is in its nature the very opposite of law as administered by the courts of the land. Complaint is made that a letter of C. E. Barker confirming the sale of the poultry, and showing that the prices named, were bona fide, was admitted in evidence, the bona fide invoice price to the consignee, here C. E. Barker and Company, was by the bill of lading made the agreed basis for ascertaining the amount of the loss, and such proof could have been made in no other way as the letter being in writing was the best evidence, and some other form of evidence might not have been competent.

We submit that there was no error in this, neither was there error in admitting the claim made to the defendant within the time limited therefor by the bill of lading, for the loss of this shipment; again the claim in writing was the best evidence that such claim had been made.

It was undoubtedly the duty of the defendant to show that the loss was due solely to some one or more of the causes which by law exempted it from liability, if it could do so, but in this the defendant wholly failed.

Notwithstanding the fact that the charge of the court was in respect to the rule which places the burden on the defendant, and as respects the interpretation of the bill of lading, which made the defendant an insurer, all, too favorable to the defendant; by force of the evidence and facts properly in proof, the jury allowing for such deterioration in the shipment as the evidence warranted, returned a verdict for the sum of $4,195.82 in favor

of the plaintiff, and ought not, even if this court should enter upon a careful analysis of the evidence, be disturbed.

This cause comes to this court on a single question, and it is this: 'Was there any evidence considered in its most favorable aspect, aided by all reasonable inferences which might be drawn therefrom, fairly tending to prove the issues' under the rule of evidence in this class of cases which places the burden of proof upon the defendant to establish freedom from default, neglect or liability?

## EVIDENCE TOUCHING THE ISSUE OF FACT SUBMITTED BY THE CHARGE OF THE COURT TO THE JURY.

**Thomas Shipley**, the care taker, a witness in rebuttal for the plaintiff, testified (printed record 197-201):

Q. What is your business?

A. I have been in the service of the Collins Produce Co. running produce cars, a good while.

Q. In what capacity?

A. Taking care of them in transportation.

Q. How long have you been engaged in that business?

A. I can't tell you definitely; I have been engaged in it between four and five years.

Q. You go along with the poultry and feed and water it?

A. Yes.

Q. How many cars—what has been the extent of your experience in that line?

A. I could scarcely answer that. From the time I have been in the service, the number of cars I would estimate at 150 to 175 cars that I have had charge of.

Q. You were with the car at Dayton, Ohio?

A. Yes, sir.

Q. What were your duties?

A. To feed and water and take care of them as well as I could.

Q. How often did you feed it?

A. Twice a day.

Q. Did you have arrangements to obtain more food?

A. Yes.

Q. From whom did you obtain feed in Dayton?

A. Farmer near by.

Q. What condition was that poultry in at the time the miltia took it?

A. Good. I have carried cars that had a death rate as low as seven and I have had them that would average around sixty or seventy.

Q. I will ask you how many fowls had died, if any, at the time the militia took this car?

A. Twenty-one, is my memory.

Q. Did you make any statement to anybody that you intended to abandon it?

A. None that I ever remember of.

Q. Did you intend to abandon it?

A. I had no thought of it.

Q. I will ask you whether or not, prior to the time the

militia took charge of this car of poultry, you abandoned it at any time?

A. No, sir; I never.

Q. Did you have money?

A. Yes.

The depositions of J. Frank Robison, William C. Nies, Lieut. E. O. Clark, and Gen. George H. Wood, all of whom testified to important facts, were taken by the plaintiff prior to the trial of this cause for purposes of rebuttal, but were voluntarily used in evidence and placed in proof at the trial by the defendant; such objections as appear in the record as having been made by the defendant to the testimony of these witnesses as well as in all other depositions used in the hearing, were none of them presented to the court, but effectually withdrawn by the use of all of the depositions in the case on behalf of and as evidence for the defendant.

Almost two hundred pages of the record is devoted to the evidence, by far the principal part thereof consisting of the depositions mentioned.

It is deemed unnecessary to set out the evidence extensively, however, it may be important to notice some portions thereof pertinent to the issue before the jury.

**Jacob Kammer**, a witness by deposition taken by the plaintiff but used on the trial by the defendant (printed record 98-102) testified:

Q. Did Mr. Shipley get feed more than once from your father?

A. Yes, sir; he got it twice.

Q. Mr. Kammer, you say it was on Sunday—that

would be March 30th—that Mr. Shipley came out to your father's place and got a supply of feed for the chickens?

A. Yes, sir.

Q. Mr. Shipley was the care taker that came along with the car of poultry?

A. Yes, sir.

Q. Do you know Mr. Nies?

A. Mr. Nies; yes, sir.

Q. Was he over at your father's at thetime Mr. Shipley was purchasing feed for the poultry?

A. Yes, sir.

Q. How often was Mr. Nies over there?

A. Twice; with Mr. Shipley.

Q. Who paid for this feed that Mr. Shipley bought?

A. Mr. Shipley paid for it himself.

**William C. Nies,** whose deposition was taken on behalf of the plaintiff but used in evidence on the trial by the defendant (printed record 58-76) testified:

Q. I will ask you whether any of that car of poultry was drowned?

A. No; none of them drowned.

Q. Mr. Nies, I will ask you to state what was the date of the Dayton flood?

A. Twenty-fifth March in the year of 1913.

Q. How long until the water had receded from the track after the 26th?

A. It was about two days, I think; I judge it to be about two days until the water went down.

Q. How did you reach the car?

A. By going right straight from my place I got over.

Q. What, Mr. Nies, was the condition of this poultry?

A. In good condition.

Q. Now with whom did Mr. Shipley stay at night while he was here in Dayton with this car of poultry?

A. Stayed with me.

Q. You may state whether or not you assisted Mr. Shipley in caring for this poultry.

A. I did, in helping carry feed, in helping feed and carrying water for the chickens; we obtained feed from Mr. Kammer, right across the road from the car.

Q. Did you have any place where this poultry could have been unloaded and cared for?

A. I did; I had a half acre up there that was well fenced in, had a good bit of wire on top of the hill over there suitable for enclosing poultry.

Q. You may state whether or not you or Mr. Shipley considered the housing and care of this poultry, if necessary, in your lot?

A. Yes, sir.

Q. What, if anything, was said to you by the farmers from whom you obtained this feed, as to whether you could have more feed?

A. He said we could get more feed if we needed it.

Q. You may state, Mr. Nies, whether or not you could have obtained feed sufficient for the poultry until such time the railroad could have moved the poultry?

A. We could.

Q. During the days from the 26th of March until the

early part of April, when the militia took it over, only twenty-one had died?

A. That was all we lost, we figured that morning.

Q. Did you know this man Groves?

A. I did when I saw him.

Q. Can you give me the exact language, as nearly as you can, that was used by this man to Mr. Shipley?

A. No, I couldn't. All that I could give you was this, that he said, "Better hand them over the car of poultry, over to the state military"—that they would die. That was all I could hear of it.

This witness further stated that he and Shipley fed and watered the poultry regularly, that the same was preserved in good condition, that he refused to turn the car over to the militia as suggested by Mr. Groves—when the state militia came he said he would not turn them over until the state militia forced him.

**John J. Corcoran,** a witness on behalf of the defendant and the superintendent of the Cincinnati, Hamilton and Dayton railroad, appeared in person and testified:

Q. Tell us if you went out, or whatever you did; tell us what you did yourself.

A. I went up to where the car was and talked to the gentleman myself; he mentioned something about getting feed from a farmer or house close by—he had gotten all they could spare; he also made mention of the fact that a man had made a proposition to him to unload the poultry and put them in an enclosure he had there. I did not pay very much attention to that but I told him

it was absolutely impossible for me to secure any feed for him, and my advice, rather than let the poultry die, would be to turn them over to the authorities, together with his invoice. He said that he would not; he wanted these chickens to go to destination. I told him it was impossible for me to tell him when the line would be open.

Q. What part of the line did you have charge of as superintendent?

A. Toledo to Cincinnati.

**Col. Edward Vollrath**, a witness whose deposition was taken and used on behalf of the defendant, (printed record 149-154), testified:

A. My attention was called to the car of poultry that was on the tracks in the C. H. & D. yards in north Dayton. It was reported that a man was in charge of it. I paid no particular attention to this car, presumably because a man was in charge of it, until about April 3rd—I say "about"—when a report reached me that the feed for the poultry had exhaused and that the man in charge was about to abandon, or had abandoned the car, and I then gave instructions to preserve the poultry as far as possible in the event that it was abandoned, and I reported the facts to Gen. Wood, who was the Governor's representative. I think it just occurs to me, that about this time, I received a postal card from an official of the C. H. & D. railroad, calling my attention to this car of poultry and urged that I give it attention, and a few days afterward I received a telephone communication from him along these same lines.

Q. Do you remember the name of the officer, or his position connected with the C. H. & D. railroad company, from whom you received the card or telephonic communication?

A. My recollection is it was either the superintendent or assistant superintendent, but I don't recall the name.

Q. What was the purport of the communication?

A. This car of chickens needed attention and urged me to take care of it or take possession of it—I don't remember which.

Q. Was it Mr. Corcoran?

A. That sounds more familiar; what was his position?

Q. Mr. Corcoran was division superintendent at the time.

A. It was either the superintendent or assistant superintendent. It might have been the division superintendent, but I would not say positively.

Q. And the telephonic communication had again requested you to take charge of the poultry?

A. Yes, sir.

Q. Did you report to Gen. Wood the information you had received from the C. H. & D. people?

A. My impression is that I did.

Q. And you reported to him the requests that had been made to you?

A. I think I reported the conversation with this gentleman and the communication received from him.

Q. Do you think you have the card?

A. I can't find it; I don't know where it is if I have it.

Q. What was the date of the taking, according to your own hand writing?

A. The date was marked March 31st, 1913.

Q. Colonel, do you remember giving the care taker of this car a receipt or certificate showing that you had seized this car to use the contents for the benefit of the flood sufferers?

A. I gave him some sort of a certificate showing what had become of the car.

**Lieut. E. O. Clark,** assistant to Adjutant Gen. George H. Wood, a witness whose deposition was taken by the plaintiff but offered in evidence by the defendant, (printed record 174-178), testified:

A. As assistant Adjutant General I had charge of the routine work at headquarters, and one afternoon I was called by some one who said he was the freight agent of the C. H. & D. He stated that there was a carload of chickens, poultry, located on the tracks in north Dayton; that it had been reported that the poultry was dying; that they were unable to move the car out of the city, and it would seem best to dispose of the contents of the car.

A. This agent, as I stated here in this letter, stated that in the interests of the people who were suffering for food at that time, and as the chickens were dying they would recommend that they be taken from the car.

A. He said, "There is a carload of chickens on our siding in North Dayton which we are unable to move. We have just been informed that they are dying; that there is no food for them," and that he thought that it was

best that the military authorities take over these chickens and distribute them among the poor—the hospitals.

A. Now I said to the agent, I said, "Do you recommend that we take those chickens? They said they would recommend it. I remember asking the question over the phone, because he knew more about the conditions of things than we did.

A. He said this is the freight agent talking.

Q. You hadn't any doubt but that was correct?

A. No, because I was just getting ready to call him up, as I state in the note.

Q. Did you report to Gen. Wood?

A. I did, but before, but almost immediately afterward, he was called by Col. Vollrath.

**Adjutant Gen. George H. Wood,** a witness whose deposition was taken by the plaintiff, but placed in proof by the defendant, (printed record 164-173), testified:

A. It was reported to me that the C. H. & D., through some person in their freight department, stated that they were unable to move this car of poultry; that the car had been abandoned by the parties in charge of it; that the poultry was dying and that no food could be obtained for same; that they advised that it be used for the hospitals and sick, of whom there were quite a number in the City of Dayton at the time.

Q. Did you act upon that advice, General Wood?

A. After getting in communication with Col. Vollrath over the phone, and receiving from him corroboration of the statements made by the railroad company, I directed him, under the circumstances of the case, to

take possession of the car of poultry and use the same for the benefit of the hospitals and sick.

A. I did not direct Col. Vollrath to take possession of the car of poultry until after I recevied the communication from the railorad company.

Q. From what department of the C. H. & D. Railroad was the information received?

A. I was told that it was received from the freight department—local freight department.

Mr. Dick: Q. General, in determining your action with reference to taking this carload of poultry, is it not a fact that you were governed in ordering this confiscation, not by anything that was said in reference to it or purporting to be said by railroad employes, but by the necessities of the situation, the same as any other stores of foodstuffs or articles that would be used for the use of the flood sufferers?

A. If it had not been for the report of Col. Vollrath, which was substantially confirmed by the statements of the railroad company, I would not have taken or ordered taken the carload of poultry, for the reason that, knowing in ordinary cases of confiscation the bill would have to be settled by some one, I would not have fed flood sufferers poultry. The practical agreement of the statements made by Col. Vollrath and whoever telephoned from the C. H. & D. governed my conduct.

Q. And the expression that came to you from the agents of the company that this property was to be disposed of through your office was taken into consideration and contributed to your action?

A. Yes, sir.

Mr. Dick: Q. General, just one question; it was not reported to you at any time during these telephone conversations who it was at the C. H. & D. freight house that was doing this talking, was it?

A. I was told it was the agent.

At page 170 printed record General Wood further testified:

Q. You answered Mr. Dick, General, that you would not have touched this car of poultry had it not been for the information received by you through your subordinates from Vol. Vollrath and the agents of the railroad company—and that is true?

A. The corroboration of the statement from the two parties finally settled my action.

And at page 171 of the printed record he also testified:

Q. General, I will ask you to examine the letter that I hand you carefully.

A. Yes, that is my signature.

Q. Did you write that letter, General?

A. Yes, I did; it is my signature.

Q. In the letter you used this expression, "the poultry was beginning to die at the time the railroad company requested us to take possession of the car in order to save the poultry that was left.

A. Well, sir, that was practically correct.

Q. That is correct; that statement is what you wish to make as your answer to the question I have just asked you?

A. That letter is practically correct, yes sir; I will stand by my handwriting.

Q. You stand by that letter?

A. Yes, sir.

And at page 173 of the printed record the General further testifies:

Q. I will just reverse the question; through your subordinates did you receive information to take and dispose of this car of poultry, at the request of the agents of the C. H. & D. railroad company?

A. The agent of the C. H. & D. Railroad Company, according to reports received by my subordinates and transferred to me, made the reports in regard to the condition of the car referred to in my previous testimony, and advised that some action should be taken in regard to the car. I make this answer after a careful consideration of the entire matter and reference to my letter of August 21, 1913. Considering that the word "request" used in that letter might possibly be too strong a word, I would now, testifying under oath, in the letter use the word "advise" instead of "request."

## THE BILL OF LADING.

The plaintiff placed the bill of lading in proof, and while its consideration is not at all important in order to sustain the verdict and while the District Court declined to share such views, the plaintiff has at all times urged that by the terms thereof (a) the defendant became an insurer on its own and connecting lines; (b) the

burden of proof to show that under the terms of the bill of lading it was released and excused from delivery.

It is not disputed that the initial carrier is responsible for the default of its agent, the connecting carrier, and we submit to the court certain conditions contained in the bill of lading, the terms of which we are unable to reconcile upon any basis other than the defendant by its own specifications creates liability as insurer and that the bill of lading should be so construed.

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as herein provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or any damage thereto, or delay, caused by the act of God, the public enemy, quarantine, the authority of law or the act or default of the shipper or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage or delay caused by fire, occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination, or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of a carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in

possession shall not be liable for loss, damage or delay while the property is stopped or held in transit upon the request of the shipper, owner, or party entitled to make such a request; or resulting from defect or vice in the property, or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper, the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from negligence shall be on the carrier or party in possession.

And again, the last provision of Section 3, of this bill of lading contains the expression "In any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence," plainly implying that liability for loss or damage exists without reference to the question of negligence.

It was argued on the trial in the District Court on behalf of the defendant that the portion of section 2, of the bill of lading which provides "No carrier shall be liable for loss or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt

the initial carrier from any such liability so imposed," nullifies and destroys the effect and force of the provisions quoted above.

In other words, the specifications contained in section 1, and the first two paragraphs in section 3, are without force and meaningless, and if so it would have been better, if such be true, to have economized in the preparation of the bill of lading by asserting one simple provision, "the carrier shall not be liable for loss, damage or injury, except as such liability is or may be imposed by law."

## BRIEF OF THE ARGUMENT.

For convenience, such of the evidence as appears to be important in the consideration of the questions raised by the defendant in this court, will be found in part II, and the material provisions of the bill of lading in part III of this brief.

Seven errors are assigned in this court, but they are not taken up and argued in their order, and the substance of such of the assignments of error as are argued at all, is embraced in the contention that the loss was occasioned and caused by Act of God, the public authorities, the state militia of Ohio.

No criticism is made of the charge given to the jury by the court, no exception was taken to any part thereof, and no assignment of error predicated thereon. The charge of the court to the jury was in every respect in harmony with the line of defense pursued upon the trial, and incorporated the suggestions of the defendant, to the extent of erring as to the law, against the rights of the plaintiff.

It is assigned as error that the claim made against the plaintiff in error as well as the letter of the consignee written to the plaintiff, were admitted in evidence by the Court. With the exception of these two items, there was no other evidence admitted by the Court over the objections of the defendant.

No exceptions were taken on the trial to the ruling of the Court on the admissibility of the evidence of the witnesses, most of whom testified by deposition, which

depositions were adopted by and placed in proof by the defendant.

The plaintiff made out its prima facie case and rested at page 52 of the printed record, and Mr. Whitnel and Mr. Dick read in evidence to the jury on behalf of the defendant, omitting to read the objections made by each party at the taking thereof (improperly copied and appearing in the printed record), the depositions contained in the record beginning at page 53 and ending on page 196 of the printed record, including the testimony of General Wood, Assistant Adjutant General Clark and Col. Vollrath.

It is claimed by the defendant that the Court erred in admitting in evidence the letter of C. E. Barker & Company, the consignee, written to the plaintiff, which letter confirmed the price to be paid for the poultry.

The invoice of the shipment was admitted in evidence without objection (printed record 45), Mr. Whitnel stating, "We have no objections to this invoice, plaintiff's Exhibit C."

The invoice gave in detail the amount and kind of fowls, but did not state the price at which they had been sold.

The letter was better evidence of the bona fide invoice price than would have been the insertion of the price per pound on the invoice, for the letter proved the contract price without question, and a bona fide invoice price must necessarily mean a bona fide selling price.

This proof was made in strict compliance with the

terms of the bill of lading, which provides "The amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee (including the freight charges, if prepaid) at the time and place of shipment."

The poultry was sold on a delivered basis, Barker & Co., Newark, N. J., were the consignees, and the basis of ascertaining the value for the purposes of this case was and is the bona fide invoice price to the "consignee" and that very clearly does not mean cost price of consignor.

Complaint is also made of the form of the claim made for damages, introduced in evidence to show what the claim was for, the items thereof and amount, and for no other purpose, and the Court admitted the same for the purpose, solely of showing that the provision of the bill of lading in that respect had been met.

There was nothing in the claim that was in conflict with any of the evidence in the case, and even if it contained more than required, the defendant was not harmed in any way by its admission in evidence.

Aside from the provisions of the bill of lading, the manager of the plaintiff, J. C. Begg (printed record 46-47) testified that the poultry was worth at Cypress, Illinois, the prices for which it was sold, the prices set forth in the claim, and this testimony was not disputed.

In presenting this case, most of the authorities relied upon by the plaintiff will be referred to in the course of the Argument, and to avoid a useless repitition

thereof the plaintiff will set forth below the legal propositions of controlling importance referred to and supported by authorities in the Argument.

1. The determination of the facts in this case was peculiarly the province of the jury, and their verdict ought not, we respectfully submit, be disturbed. Besides, it seems to be a rule long established that the questions here presented were for the determination of the trial judge; that is,

> "Was there any evidence considered in its most favorable aspect aided by all reasonable inferences which might be drawn therefrom, fairly tending to prove the issue."
>
> Hellick v. Searcy, 278 Ill. 116, at page 121.

2. When the defendant placed in proof the communications by telephone, purporting to have occurred between the agents of the connecting carrier and the militia, such conversations became evidence for the consideration of the jury.

> "When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business through that channel. Conversations so held are as admissable in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissable."
>
> Wolfe v. Missouri Pacific Railway Co., 97 Mo. 473, approved and quoted in the case of Godair v. Ham National Bank, 225 Ill., at page 575.

3. A party placing in proof the depositions of the opposite party cannot be heard to complain that the jury gave credit to such testimony.

> "What are we to understand, in legal parlance of evidence belonging to a suitor? Certainly that it pertains to him who introduces it. The appellant in this case introduced it (the deposition) while the opposite side refused to do so, and he thus made it his testimony—read the whole of it without objection. After this it does not lie with him to say that it is illegal or incompetent. Our conclusion is that when a paper or deposition is read as evidence to the jury the party using it admits it to be proper evidence."
>
> Jewel v. Center & Co., 25 Ala., 504.

4. Under the terms of the bill of lading, the provisions of the Carmack Amendment and the decisions of this court in construing like provisions and the Carmack Amendment, the burden of proof to establish freedom from liability rests upon the defendant.

> "The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract, was then cast upon the carrier."
>
> Galveston H. & S. A. Ry. Co. v. Wallace, 223 U. S. 492.

5. Military control, or, so-called martial law said to depend upon the whim of the commander, does not relieve a carrier under the law or under the terms of the bill of lading from the performance of the duty to transport with reasonable dispatch and safely deliver at destination, exercising reasonable diligence to that end.

"It is obvious, however, that the mere declaration of martial law would not relieve a common carrier operating in the district thus covered of all liability to the shipper.

I. C. R. R. v. McClellan, 54 Ill., 71.

6. An act of God to be a defense must be the sole cause of the loss.

"The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by an act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

Wolfe v. American Express Co., 43 Mo., 421.

A car load of oats having been delayed in shipment, reached Dayton on March 24, 1913, and when the flood waters went down the oats were found to be wet and damaged. A suit was brought to recover damages and the defense interposed was that "A carrier is not liable for a loss of property in shipment through an act of God which could not reasonably have been foreseen," notwithstanding the previous negligence of the carrier by which the shipment was delayed.

This question arose in the case of Mueller Grain Co. vs. Chicago P. & St. L. R. C., 200 Ill. App. 347. The Appellate Court of Illinois sustained a judgment for damages and followed the rule stated in 1 Corpus Juris under title "Act of God," page 1172, quoting from page 1174.

"The principle embodied in all the definitions is that the act must be one occasioned exclusively by

the violence of nature and all human agency is to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God."

The Dayton flood, like other floods, while an "Act of God" merely delayed the movement of the shipment and furnished the occasion, but nothing more, for the agents of the carrier to invite the militia to take and distribute the poultry, and the whole occurrence was one hundred per cent the result of human agencies, and in no sense whatever attributable to an "Act of God."

7. As soon as the flood could reasonably be overcome the carrier must complete the transportation without delay.

In the meantime a duty rests upon the carrier to preserve and protect the property in transit. "As soon as the impediment to the transportation of the company is removed or can be reasonably be overcome, the carrier must complete the contract without delay."

B. & O. R. R. Co. v. O'Donnell, 49 Ohio Stat. 489 at page 502.

8. The Carmack Amendment to the act to regulate commerce was designed to provide unity of transportation, unity of responsibility and unity of application.

"The provision in question is not to be construed

in one way with respect to the initial carrier and in another with respect to the connecting carrier."

Georgia F. & A. R. Co. v. Blish Milling Co., S. C. Rep. 36 at page 545.

9. Upon a bill of lading issued under the Carmack Amendment, a suit in favor of the holder and against the connecting carrier may be maintained to recover damages when the shipment is delivered by mistake to a party other than the consignee.

Georgia F. & A. R. R. Co., supra.

10. The connecting carrier is the agent of the initial carrier and damages resulting from failure of the connecting carrier to transport with safety and with reasonable dispatch may be recovered from the initial carrier.

"The duty to transport with reasonable dispatch is none the less an integral part of the normal undertaking of the carrier, and we can gather no intent to unify only a portion of the carriers' responsibility."

New York Pa. & Norfolk R. R. Co. v. Penninsula Prod. Exchange, S. C. Rep. 36, page 230.

11. Notice in any form that a claim is made for loss is sufficient.

Georgia F. & A. R. Co. v. Blish Milling Co., S. C. Rep. 36 at page 545.

12. The basis of value is the bona fide invoice price to the consignee, Barker & Co., whether consignor or consignee as holder of the bill of lading seek to recover loss.

"The amount of any loss or damage for which

any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading."

Second paragraph of section 3, Bill of Lading (printed record 40).

13. The liability of the initial carrier and the connecting carrier the agent of the initial carrier is for through transportation and delivery to the consignee and for damages in case of loss.

"Section 1 The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereafter provided."

"No carrier nor party in possession of any property herein described shall be liable for any loss thereof or any damage thereto, or delay caused by the act of God, the public enemy quarantine, the authority of law." . . . .

Bill of Lading (printed record 39).

The second paragraph of section 2 of the bill of lading provides that the responsibility for loss occurring on a line of a connecting carrier is such as is or may be imposed by law, but that nothing contained in the bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

14—The exception mentioned, 'the authority of law' was undoubtedly used in the bill of lading with due consideration, having in mind the normal meaning of the words used, which has always had reference to the au-

thority eminating from the law of the land as administered by and through the duly created state and federal courts.

It is inconceivable that any normal mind would understand from this expression, that the whim of a man in charge of a state militia or any portion thereof, acting in the name of so-called martial law, should serve to excuse a carrier; or that the phrase 'the authority of law' was used in such a wreckless manner as to include depredations by state militia.

No provision was inserted in the bill of lading to relieve the carrier in possession against seizures or depredations committeed by state militia, a duly constituted police force, or other organized body of men. And it is no answer to reply that the contract or bill of lading should have contained such a provision to meet a case where the militia of its own volition confiscates property.

ARGUMENT.

> "The only question in this case is a question of fact and a very simple one, and it is this: Whether, from all this evidence, you believe that this property was taken and seized by the military authorities by and on the invitation of the Cincinnati, Hamilton and Dayton Railroad or any of its authorized officers and agents. That is the only question you have to decide in this case."

Charging the jury that the defendant would not be held for damages if the militia acted of its own volition,

the District Court submitted this question of fact to the jury and the jury found against the defendant on this issue.

The United States Circuit Court of appeals held that "while the testimony on this issue was contradicted, the District Court was amply justified in submitting to the jury the question of whether the property was taken and seized by the military authorities by and upon the invitation of the carrier."

The case is before this Court, therefore, on this single, simple question of fact.

At the time the case was tried the charge given to the jury embraced the views of the defendant on the law of this case. The plaintiff, however, cannot concede that voluntary action by the militia would have been a defense or that the burden of proof lies upon the plaintiff, as stated by the Court.

Had the case for the plaintiff not been strong and the defense weak on this question, submitted to the jury, the charge given might have been sufficiently harmful to have lost the case to the plaintiff.

Having lost the case in the District Court upon the theory of the law advanced by the defendant and adopted by the court, that a voluntary seizure by the militia uninfluenced by the connecting carrier, would relieve the defendant of liability, and having failed on the issue of fact before the jury, and the District Court having refused to set the verdict aside, the defendant for the first time in the United States Court of Appeals, and

again in this court, takes the unusual and untenable position that even if the Superintendent, officers and agents of the connecting carrier requested the seizure of the poultry, and that solely because of such request, the poultry was seized, still the defendant would not be liable.

In other words it is contended by the defendant that the acts of the officers and agents of the carrier are in no sense the acts of, binding upon the carrier, (a) because there had been a flood at Dayton, and further (b) because the Governor had sent the militia to Dayton to protect property and to prevent depredations.

The evidence shows that the flood of March 25, 1913, receded after about two days, and that freight traffic eastward was resumed on the 6th or 8th of April, that on March 31st the officers and the agents of the carrier having succeeded in inducing the militia to consent to take the car, sent its switch engine and crew and moved the car from a country siding in North Dayton, a distance of about one mile down town to Leo Street when it was afterward distributed by the militia.

It was conceded that the Governor sent the militia; it was not conceded or proven that the action was based on any law of the state, neither was such proof made. It was conceded that what the defendant is pleased to call martial law was proclaimed and that the militia took charge to regulate the affairs of the community so as to preserve order, protect property and prevent depredations.

It was not conceded, nor proven that such action was based upon any law of the state of Ohio, and the statute gives no authority under any circumstances to trample under foot the right of persons or corporations to the protection of the law as respects property and property rights or to molest in any way property of any character; this was in time of peace and the militia as the police officers of the state of Ohio had no more or greater right when acting of its own volition, in the very nature of things, and can have no more or greater rights, than the police force in any city that might be named, would have, whether acting under direction of their chief officer, be it even the Mayor; to relieve a carrier of responsibility by seizing the property thereof in transit, and such acts would be no defense at common law or under the terms of the bill of lading.

Apparently the defendant desires the Court to understand that Shipley the care-taker had abandoned the car and that the militia took actual charge and possession of the car early in the situation; nothing could be further from the truth. Shipley and Nies testified that they fed and watered the poultry twice each day and remained with the same until the carrier moved it down to Leo Street. Supt. Corcoran testified that he called on Shipley, who was in charge of the car, and suggested that the care-taker turn it over to the militia, but that Shipley refused and stated that the car must go to its destination; Col. Vollrath in his testimony corroborated Supt. Corcoran by saying that Shipley was there in

charge and that he gave to Shipley a statement in writing as to the taking of the car.

Col. Vollrath testified that seeing that there was a man in charge he gave the car no further attention; the proof is that the poultry was in good condition, that the feed was on hand or arranged for and that the tracks were being cleared and placed in condition for the movement of freight soon, the serious conditions which had existed had passed away; nevertheless, in disregard of the rights of the plaintiff and the contract of affreightment, the agents and officers incited the seizure.

When the plaintiff had made out its prima facie case by proving that the goods had not been delivered to the consignee "the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier."

Galveston H. & S. A. Ry. Co. v. Wallace, 223 U. S. at 472.

The onus was therefore on the defendant to prove the existence of a defense.

Has the defendant done this? The flood was an act of God but the car of poultry was safe on high ground. The Governor sent the militia to aid in preserving and not to destroy property; this is most assuredly no defense.

Gen. Wood testified that he would not have fed flood sufferers this poultry had it not been for the representations made to him, eminating from the railroad.

The defendant proved by the evidence in the form of depositions, most of which were brought into court by the plaintiff for use in the rebuttal, beyond any question that the officers and agents of the C., H. & D. railroad suggested and invited the seizure and that these acts influenced the acts of Gen. Wood. Can it be said that proof of this character is a defense?

Can it be contended that the proof of the commission of such acts of unfaithful service by its officers and agents is a defense? Yet in substance these are the facts proven by the defendant and relied upon as a defense.

Strange as it may seem, at the trial Mr. Dick and Mr. Whitnel for the defendant introduced in evidence as part of the defense, voluminous depositions taken by the plaintiff in Ohio for use in rebuttal including that of Gen. Wood, his assistant, Lieut. Clark, that of Nies who assisted Shipley, Col. Vollrath, whose deposition the defendant took, and others, and read all the questions and answers appearing therein to the jury; this evidence developed a number of communications by telephone between the officers and agents of the defendant with Col. Vollrath and the office of Gen. Wood, advising and requesting that the militia take and distribute the poultry.

When the case came up for argument in the

Court of Appeals it was urged by the defendant that this evidence was improper, incompetent and inadmissable. This question was not and could not be considered, because the defendant had placed the same in proof. And here it is urged that this evidence is not proper to be considered by the jury, because the persons talking were not identified as agents, except as shown by their own representations (which were sufficient to convince Lieut. Clark, Gen. Wood and Col. Vollrath of genuineness) and that all such evidence is proofless.

When this testimony was placed in proof the defendant invited the jury to give credit and to rely upon such evidence, and the preliminary question of agency never arose as might have been the case had the plaintiff been permitted by the defendant to make use of its depositions in rebuttal.

This evidence was not calculated to impress the minds of the jurors as establishing the defendant's freedom from fault, and the defendant is not in the position to complain because the jury did not disbelieve the testimony or that the jury gave too much weight thereto.

The defendant instead of establishing some one or more of the causes named in the bill of lading by a preponderance of the evidence relieving it of responsibility, quite completely established the contrary to be true and is in no position to dispute its liability under the evidence.

The argument that the defendant, conceding that the

agents of the connecting carriers, induced and procured the seizure of the poultry, but nevertheless the defendant is not responsible, not only is unsound and is without authority for support, but it is contrary to all known rules of law. Suct a reactionary doctrine if adopted by this court would endanger and upset all the rules of law that furnish protection to the rights of the shipper, the curtailment of which by contract was sought to be prevented by the Carmack amendment.

## THE FACTS AND THE VERDICT.

The determination of the facts in this case was peculiarly the province of the jury, and their verdict ought not, we respectfully submit, be disturbed. Besides, it seems to be a rule long established that the questions here presented were for the determination of the trial judge.

In Mount Adams and E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463, 465 (Decisions by U. S. Circuit of Appeals for the Sixth Circuit, in which the Court was composed of Taft and Lurton, Circuit Judges, and Hammond, J., and in which case the authorities on the question of when a case should be submitted to the jury is reviwed at length) the Court said:

> "The fifth error assigned can best be considered at this point. It is that the Court erred in refusing to direct a verdict for the defendant at the close of all the evidence. In support of this motion the entire facts in the case have been elaborately argued. Under the repeated rulings of this Court, as

well as of the Supreme Court, it must re regarded as settled that upon a writ of error no question can be raised as to whether the verdict was against the weight of evidence. That was a question for the sole determination of the trial Judge upon the motion for a new trial. His action in refusing a new trial upon that ground cannot be assigned as error. The question, when a motion to direct a verdict is made, is this: Is there any material and substantial evidence, which if credited by the jury, would in law justify a verdict in favor of the other party."

In the case of Improvement Co. v. Munson, 14 Wall, 442, Mr. Justice Clifford, speaking for the Court, said:

"That in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

The next, and perhaps the leading case on the subject, is that of Pleasants v. Fant, 22 Wall 116. Mr. Justice Miller delivered the opinion of the Court. He said in the course of it, as indicating the disinclination of the Court to disturb the holding of the trial Judge:

"No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case, it must be submitted to the jury; and in the present case, if the Court had submitted it, with proper instructions, it would be difficult to

say that it would have been an error of which the defendant could have complained here."

The case of Hellick v. Searcy, 278 Ill. 116, at page 121, states the rule categorically thus:

> "Was there any evidence considered in its most favorable aspect aided by all reasonable inferences which might be drawn therefrom, fairly tending to prove the issues."

A PARTY PLACING IN PROOF THE DEPOSITIONS OF THE OPPOSITE PARTY, CANNOT BE HEARD TO COMPLAIN THAT THE JURY GAVE CREDIT TO SUCH TESTIMONY.

It is both the law and common sense as well, that where the opposing party reads a deposition taken by the other side, he adopts it as his own.

In the case of Fountain v. Ware, 56 Alabama 558, the Court held that where "the opposing party reads a deposition taken by the other side, he adopts it as his own, and must in all things submit to the same intendments and rules as if he had first sought to make the witness his own."

And again in Jewell v. Center & Co., 25 Ala. 504, the Court said:

> "What are we to understand, in legal parlance by testimony belonging to a suitor? Certainly that it pertains to him who introduces it. The appellant in this case introduced it (the deposition) while the opposite side refused to do so, and he thus made it